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THE

LAW REPORTS.

529 N

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

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Page	*Line*	*For*	*Read*
48	15	Solicitors: *Snell & Greenip; Stevens & Harries*	Solicitors for Petitioners: *Best, Webb, & Co.* Solicitors for Company: *Stevens & Harries.* Solicitors for Shareholders opposing: *Snell & Greenip.*
569	— 5	purchaser	vendor.
643	— 7	*Romer*	*Hood*
811	— 8	purchase	pasture.
875	— 11	Add to names of Respondent's counsel	*J. Gerard Laing.*
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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Adair *v.* Young	136
Alison, *In re.* Johnson *v.* Mounsey	284
Allen, *In re.* Davies *v.* Chatwood	244
——, Griffin *v.*	913
—— *v.* Seckham	790
Ambroise *v.* Evelyn	759
Anstey *v.* North and South Woolwich Subway Company	439
Arthur *v.* Mackinnon	385
Artley, York Union Banking Company *v.*	205
Astrup, *Ex parte. In re* Le Fevre	303
Attorney-General *v.* Biphosphated Guano Company	327
—— *v.* Great Eastern Railway Company	449
Austin *v.* Jackson	942, n.

B.

	PAGE
Bagot *v.* Easton. Easton *v.* Bagot	392
Ball's Trust, *In re*	270
Banco de Portugal, *Ex parte. In re* Hooper	317
Barber, *In re.* Dardier *v.* Chapman	442
Bates, *Ex parte. In re* Pannell	914
Bath's Case. *In re* Norwich Provident Insurance Company	386
Beadon, Sykes *v.*	170
Bentham Mills Spinning Company, *In re*	900
Besant, *In re*	508
Billericay Highway Board, Woodard *v.*	214
Bilton, Saner *v.*	416
Biphosphated Guano Company, Attorney-General *v.*	327
Birmingham Canal Company *v.* Cartwright	421
Birt *v.* Burt	773, n.
Blake, *Ex parte. In re* McEwan	572
Bolton *v.* Bolton	968
Bridgman, Sturges *v.*	852

PAGE

Bright, Marner *v.* – – 394, n.
British Dynamite Company *v.* Krebs – – – – 448
Brown, *Ex parte. In re* Yates 148
Buckton *v.* Hay. *In re* Ridley 645
Burnell *v.* Burnell – – – 213
Burrell, Krehl *v.* – – – 146
Burt, Birt *v.* – – – 773, n.

C.

Carr, *Ex parte. In re* Hofmann 62
Carrick, Ralph *v.* – – – 873
Cartwright, Birmingham Canal Company *v.* – – – 421
———, Stirling-Maxwell *v.* 522
Chalmers, *Ex parte. In re* Sawers 911
Champney *v.* Davy – – 949
Chapman, Dardier *v. In re* Barber – – – – 442
Chatwood, Davies *v. In re* Allen 244
Chick, *Ex parte. In re* Meredith 731
Child *v.* Stenning – – – 82
Church, Wilson *v.* – – – 576
Cock, *In re. Ex parte* Rosevear China Clay Company – – 560
Collett *v.* Dickenson – – 687
Constable *v.* Constable – – 681
Cooper, *Ex parte. In re* McLaren 68
Costa Rica (Republic of) *v.* Strousberg – – – – 323
Cowlishaw, Renals *v.* – – 866
Cracknall *v.* Janson – – 1
Credit Company, *In re* – – 256
Cresswell *v.* Parker – – 601
Cross, *In re. Ex parte* Payne – 539
Crumlin Viaduct Works Company, *In re* – – – 755

D.

Dale & Co., *Ex parte. In re* West of England Bank – – 772
Dardier *v.* Chapman. *In re* Barber – – – – 442
Davidson, *In re.* Martin *v.* Trimmer – – – – 341
——— *v.* Trimmer – – 341
Davies *v.* Chatwood. *In re* Allen 244
Davis, Moore *v.* – – – 261
Davy, Champney *v.* – – 949
Dickenson, Collett *v.* – – 687

PAGE

Ditton, *Ex parte. In re* Woods 56
Dodds, Wymer *v.* – – – 436
Dover, London and County Banking Company *v.* – – 204
Duleep Singh, Robinson *v.* – 798
Duncan, Fox, & Co. *v.* North and South Wales Bank – – 88
Dynevor, Dyffryn, and Neath Abbey Collieries Company, *In re* – – – – – 605

E.

Easton, Bagot *v.* Easton *v.* Bagot 392
Emma Silver Mining Company *v.* Grant – – – – 918
Evans, *Ex parte. In re* Watkins 691
Evelyn, Ambroise *v.* – – 759

F.

Fisher *v.* Keane – – – 353
Freccia, Sturla *v.* – – – 741
Freshfield's Trust, *In re* – – 198
Fulford, Walrond *v.* – – 640

G.

Gee *v.* Mahood – – – 891
Gilbert *v.* Smith – – – 78
Giles, Hamer *v.* Hamer *v.* Giles 942
Gold Company, *In re* – – 701
Gosling, Taite *v.* – – – 273
Grant, Emma Silver Mining Company *v.* – – – 918
Gray, Polini *v.* – – – 741
Great Eastern Railway Company, Attorney-General *v.* – – 449
Griffin *v.* Allen – – – 913
Grimshaw's Trusts, *In re* – 406
Gutierrez, *Ex parte. In re* Gutierrez – – – – 298

H.

Halford, Hodgson *v.* – – 959
Hall, Standering *v.* – – – 652
Hamer *v.* Giles. Giles *v.* Hamer 942
Hare, *In re. Ex parte* Welchman 48
Hargreaves' Trade-Mark, *In re* 669

PAGE

Harris *v.* Harris. *In re* Woolrich, Deceased – – – 663
———, Mason *v.* – – – 97
Harrison *v.* Wearing – – 206
Hay, Buckton *v.* *In re* Ridley 645
Hinds, Pilcher *v.* *In re* Pilcher 905
Hirst, *Ex parte.* *In re* Wherly 278
Hodgson (a Person of Unsound Mind), *In re.* Kenlis (Lord) *v.* Hodgson – – – 888
———— *v.* Halford – – 959
————, Kenlis (Lord) *v.* *In re* Hodgson (a Person of Unsound Mind) – – – – 888
Hofmann, *In re.* *Ex parte* Carr 62
Holt (an Infant), *In re* – – 168
Hooper, *In re.* *Ex parte* Banco de Portugal – – – 317
Horbury Bridge Coal, Iron, and and Waggon Company, *In re* 109
Horlock, Sweetapple *v.* – – 745
Howell, Mullins *v.* – – – 763

J.

Jackson, Austin *v.* – – 942, n.
James *v.* Rumsey – – – 398
Janson, Cracknall *v.* – – 1
Johnson *v.* Mounsey. *In re* Alison 284

K.

Keane, Fisher *v.* – – – 353
Kelly & Co., *Ex parte.* *In re* Smith, Fleming, & Co. – 306
Kenlis (Lord) *v.* Hodgson. *In re* Hodgson (a Person of Unsound Mind) – – – – 888
Kenyon, West Cumberland Iron and Steel Company *v.* – – 782
Kimber, *Ex parte.* *In re* Thrift 869
Kirkwood, *Ex parte.* *In re* Mason 724
Knight *v.* Pursell – – – 412
Krebs, British Dynamite Company *v.* – – – – 448
Krehl *v.* Burrell – – – 146
Kusel *v.* Watson – – – 129

L.

Le Fevre, *In re.* *Ex parte* Astrup 303
Levy *v.* Lovell – – – 220
London and Caledonian Marine Insurance Company, *In re* – 140
London and County Banking Company *v.* Dover – – 204
London and North Western Railway Company, Norton *v.* 118
London Assurance *v.* Mansel – 363
London, Chatham, and Dover Railway Company, Sevenoaks, Maidstone, and Tunbridge Railway Company *v.* – – 625
Loog, Singer Manufacturing Company *v.* – – – 656
Lovell, Levy *v.* – – – 220
Luke *v.* South Kensington Hotel Company – – – – 121

M.

McEwan, *In re.* *Ex parte* Blake 572
Mackinnon, Arthur *v.* – – 385
McLaren, *In re.* *Ex parte* Cooper 68
Mahood, Gee *v.* – – – 891
Mansel, London Assurance *v.* – 363
Marner *v.* Bright – – 394, n.
Martin *v.* Trimmer. *In re* Davidson – – – – – 341
Mason, *In re.* *Ex parte* Kirkwood 724
——— *v.* Harris – – – 97
Meredith, *In re.* *Ex parte* Chick 731
Midland Railway Company, Mulliner *v.* – – – – 611
Moore *v.* Davis – – – 261
Morris, Taunton *v.* – – – 779
Moseley's Trusts, *In re* – – 555
Mounsey, Johnson *v.* *In re* Alison – – – – – 284
Mulliner *v.* Midland Railway Company – – – – 611
Mullins *v.* Howell – – – 763

N.

North and South Wales Bank, Duncan, Fox, & Co. *v.* – – 88
North and South Woolwich Subway Company, Anstey *v.* – 439
Norton *v.* London and North Western Railway Company – 118
Norwich Provident Insurance Company, *In re.* Bath's Case 386

P.

PAGE

Pannell, *In re.* *Ex parte* Bates 914
Parker, Cresswell *v.* – – 601
Paterson, *Ex parte.* *In re* Throckmorton – – – – 908
Payne, *Ex parte.* *In re* Cross – 539
Penny *v.* Penny – – – 440
Pilcher, *In re.* Pilcher *v.* Hinds 905
——— *v.* Hinds. *In re* Pilcher 905
Polini *v.* Gray – – – 741
Price (Deceased), *In re.* Price *v.* Price – – – – 163
—— *v.* Price. *In re* Price, Deceased – – – – 163
Pursell, Knight *v* – – – 412

R.

Ralph *v.* Carrick – – – 873
Redgrave, Wright *v.* – – 24
Renals *v.* Cowlishaw – – 866
Republic of Costa Rica *v.* Strousberg – – – – – 323
Rica Gold Washing Company, *In re* – – – – – 36
Richards & Co., *In re* – – 676
Ridley, *In re.* Buckton *v.* Hay 645
Robinson *v.* Duleep Singh – 798
Rodwell, Watson *v.* – – 150
Roper's Trusts, *In re* – – 272
Rosevear China Clay Company, *Ex parte.* *In re* Cock – – 560
Rosslyn, Walrond *v.* – – 640
Rotherham's Trade-Mark, *In re* 250
Rumsey, James *v.* – – – 398

S.

Saner *v.* Bilton – – – 416
Sawers, *In re.* *Ex parte* Chalmers 911
Seckham, Allen *v.* – – – 790
Sevenoaks, Maidstone, and Tunbridge Railway Company *v.* London, Chatham, and Dover Railway Company – – 625
Shanks, *In re.* *Ex parte* Swinbanks – – – – 525
Singer Manufacturing Company *v.* Loog – – – – 656
Slater's Trusts, *In re* – – 227
Smith, Fleming, & Co., *In re.* *Ex parte* Kelly & Co. – – 306

PAGE

Smith, Gilbert *v.* – – – 78
Smith's Case. *In re* South Durham Iron Company – – 579
South Durham Iron Company, *In re.* Smith's Case – – 579
South Kensington Hotel Company, Luke *v.* – – – 121
Spratt's Patent *v.* Ward & Co. – 240
Standering *v.* Hall – – – 652
Stanhope Silkstone Collieries Company, *In re* – – – 160
Stenning, Child *v.* – – – 82
Stirling-Maxwell *v.* Cartwright 522
Strousberg, Republic of Costa Rica *v.* – – – – 323
Sturges *v.* Bridgman – – 852
Sturla *v.* Freccia – – – 741
Swansea Friendly Society, *Ex parte.* *In re* West of England Bank – – – – 768
Swanston *v.* Twickenham Local Board – – – – 838
Sweetapple *v.* Horlock – – 745
Swinbanks, *Ex parte.* *In re* Shanks 525
Sykes *v.* Beadon – – – 170

T.

Taite *v.* Gosling – – – 273
Taunton *v.* Morris – – – 779
Taylor *v.* Taylor. *In re* Wilford's Estate – – – 267
Thompson, Wingrove *v.* – – 419
Thrift, *In re.* *Ex parte* Kimber 869
Throckmorton, *In re.* *Ex parte* Paterson – – – – 908
Trimmer, Davidson *v.* – – 341
Twickenham Local Board, Swanston *v.* – – – – 838

U.

Uruguay Central and Hygueritas Railway Company of Monte Video, *In re* – – – 372

W.

Walrond *v.* Fulford – – 640
——— *v.* Rosslyn – – 640
Ward & Co., Spratt's Patent *v.* – 240
Watkins, *In re.* *Ex parte* Evans 691

	PAGE
Watson, Kusel *v.* – – –	129
——— *v.* Rodwell – – –	150
Wearing, Harrison *v.* – –	206
Welchman, *Ex parte. In re* Hare	48
West Cumberland Iron and Steel Company *v.* Kenyon – –	782
West of England Bank, *In re. Ex parte* Dale & Co. – –	772
———————, *In re. Ex parte* Swansea Friendly Society – – – –	768
Wherly, *In re. Ex parte* Hirst	278
Wilford's Estate, *In re.* Taylor *v.* Taylor – – – –	267
Wilson *v.* Church – – –	576
Wingrove *v.* Thompson – –	419
Woodard *v.* Billericay Highway Board – – – –	214
Woods, *In re. Ex parte* Ditton	56
Woolrich (Deceased), *In re.* Harris *v.* Harris – – –	663
Wright *v.* Redgrave – –	24
Wymer *v.* Dodds – – –	436

Y.

Yates, *In re. Ex parte* Brown –	148
York Union Banking Company *v.* Artley – – – –	205
Young, Adair *v.* – – –	136

TABLE OF CASES CITED.

A.

		PAGE
Adams *v.* Adams	Law Rep. 14 Eq. 246	665
——— *v.* Angell	5 Ch. D. 634	293
——— *v.* Paynter	1 Coll. 530	126
Adamson, Ex parte	8 Ch. D. 807	319
Aitchison *v.* Dixon	Law Rep. 10 Eq. 589	164, 444
Albion Steel and Wire Company, In re	7 Ch. D. 547	678
Allan *v.* Gott	Law Rep. 7 Ch. 439	441
——— *v.* Gripper	2 C. & J. 218	71
Allen, Ex parte	Law Rep. 11 Eq. 209	543
——— *v.* Jackson	1 Ch. D. 399	964
Allhusen *v.* Labouchere	3 Q. B. D. 654	439
Alliance Bank *v.* Broom	2 Dr. & Sm. 289	8
Anderson *v.* Boynton	13 Q. B. 308	246
Andrew, In re	1 Ch. D. 358	304
Anglo-Italian Bank *v.* Davies	9 Ch. D. 275	693
Angus *v.* Dalton	3 Q. B. D. 85	414, 854
Anon.	6 Madd. 10	287
Arlett *v.* Ellis	7 B. & C. 346	827
Armitage *v.* Coates	35 Beav. 1	647
Arthur Average Association, In re	Law Rep. 10 Ch. 542	185
Arundel (Corporation of) *v.* Holmes	4 Beav. 325	416
Ashbury Railway Carriage and Iron Company *v.* Riche	Law Rep. 7 H. L. 653	487
Ashmore's Trusts, In re	Law Rep. 9 Eq. 99	408
Ashton *v.* Blackshaw	Law Rep. 9 Eq. 510	28
Aspinall *v.* Petvin	1 S. & S. 544	875
Atkinson *v.* Atkinson	Ir. L. R. 6 Eq. 184	665
Attorney-General *v.* Cockermouth Local Board	Law Rep. 18 Eq. 172	454
——— *v.* Cordwainers' Company	3 My. & K. 534	430
——— *v.* Ely, Haddenham, &c., Railway Company	Law Rep. 4 Ch. 194	473
——— *v.* Great Northern Railway Company	1 Dr. & Sm. 154	454
——— *v.* Oxford, Worcester, &c., Railway Company	2 W. R. 330	454
——— *v.* Swansea Improvements and Tramways Company	9 Ch. D. 46	578

		PAGE
Attwater, Ex parte	5 Ch. D. 27	543
Atwool *v.* Ferrier	14 W. R. 1014	9
——— *v.* Merryweather	Law Rep. 5 Eq. 464, n.	103
Austin *v.* Jackson	11 Ch. D. 942, n.	942

B.

Baggett *v.* Meux	1 Coll. 138; 1 Ph. 627	648
Bagnall *v.* Carlton	6 Ch. D. 371	932
Baird *v.* Wilkinson	15 C. B. (N.S.) 376	784
Baker *v.* Baker	6 H. L. C. 616	894
——— *v.* Hall	12 Ves. 497	166, 443
——— *v.* Harris	16 Ves. 397	694
Ball *v.* Ray	Law Rep. 8 Ch. 467	854
——— *v.* Robinson	2 Eagle & Y. 289	828
Bank of Gibraltar and Malta, In re	Law Rep. 1 Ch. 69	707
Banner, Ex parte	Law Rep. 9 Ch. 379	223
Barker *v.* Greenwood	2 Y. & C. Ex. 414	531
Barlow *v.* Rhodes	1 C. & M. 439	971
Barnfather *v.* Barrow	37 L. T. (N.S.) 231	226
Barr's Trusts, In re	4 K. & J. 219	200
Barton *v.* Tattersall	1 Russ. & My. 237	52
Batchelor *v.* Middleton	6 Hare, 75	287
Bateman *v.* Ashton (Corporation of)	3 H. & N. 323	502
Baxendale *v.* McMurray	Law Rep. 2 Ch. 790	854
Baylis *v.* Tyssen-Amhurst	6 Ch. D. 500	810
Bealey *v.* Shaw	6 East, 208	854
Beauchamp (Earl) *v.* Winn	Law Rep. 6 H. L. 224	827
Beaujolais Wine Company, In re	Law Rep. 3 Ch. 15	707
Bedford (Duke of) *v.* Trustees of British Museum	2 My. & K. 552	868
Beevor *v.* Luck	Law Rep. 4 Eq. 537	8
Beman *v.* Rufford	1 Sim. (N.S.) 550	637
Bendix *v.* Wakeman	12 M. & W. 97	445
Bennett *v.* Moore	1 Ch. D. 692	214
Beresford *v.* Driver	14 Beav. 387	325
Bermondsey (Vestry of) *v.* Brown	Law Rep. 1 Eq. 204	331
Bernard *v.* Minshall	Joh. 276	956
Berndston *v.* Strang	Law Rep. 4 Eq. 481; Ibid. 3 Ch. 588	563
Berridge *v.* Bellew	32 L. T. (N.S.) 807	246
Beynon *v.* Cooke	Law Rep. 10 Ch. 389	236
Bigg *v.* Strong	3 Sm. & Giff. 592	124
Binford *v.* Bawden	1 Ves. 512	655
Bird *v.* Hunsdon	2 Sw. 342	874
Birt *v.* Burt	11 Ch. D. 773, n.	773
Bishop *v.* Hatch	1 A. & E. 171	734
Blackmore *v.* Smith	1 Mac. & G. 80	437
Blackwell *v.* Bull	1 Keen, 176	874
Blagrave *v.* Routh	8 D. M. & G. 620	153
Blake *v.* Appleyard	3 Ex. D. 195	416
Blakemore *v.* Glamorgan Canal Company	1 My. & K. 154	476
Bliss *v.* Hall	4 Bing. N. C. 183; 5 Scott, 500	854
Blount *v.* Bestland	5 Ves. 515	444
Bloxam *v.* Sanders	4 B. & C. 941	563
Bolton *v.* Lancashire and Yorkshire Railway Company	Law Rep. 1 C. P. 431	71

		PAGE
Bond *v.* Simmons	3 Atk. 20	444
Bordier *v.* Burrell	5 Ch. D. 512	658
Borough of Hackney Newspaper Company, In re	3 Ch. D. 669	582
Bostock *v.* North Staffordshire Railway Company	3 Sm. & Giff. 283; 4 E. & B. 798	617
Boughton *v.* James	1 Coll. 26; 1 H. L. C. 406	963
Bowes *v.* Law	Law Rep. 9 Eq. 636	84
Bowyer *v.* Woodman	Law Rep. 3 Eq. 313	236
Brandreth's Trade-Mark, In re	9 Ch. D. 618	675
Brantom *v.* Griffits	1 C. P. D. 349; 2 C. P. D. 212	542
Bridson *v.* Benecke	12 Beav. 1	137
Bright *v.* Larcher	3 De G. & J. 148	893
——— *v.* Walker	1 C. M. & R. 211	331
——— *v.* ———	4 Tyrw. 502	861
Brocklehurst *v.* Jessop	7 East, 438	293
Brook, Ex parte	10 Ch. D. 100	909
———, In re	26 W. R. 791	673
——— *v.* Jenney	2 Q. B. 265	217
Brown, Ex parte	11 Ch. D. 148	531
——— *v.* Adams	Law Rep. 4 Ch. 764	310, 773
——— *v.* Brown	33 Beav. 399	348
——— *v.* Sewell	11 Hare, 49	402
Bryant, Ex parte	1 V. & B. 211	726
Bryden *v.* Willett	Law Rep. 7 Eq. 472	882
Bunney *v.* Poyntz	8 M. & W. 431	78
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	585
Bush *v.* Trowbridge Waterworks Company	Law Rep. 10 Ch. 459	42
Butcher *v.* Stead	Law Rep. 7 H. L. 839	310
Butt *v.* Monteaux	1 K. & J. 98	186

C.

Cage *v.* Acton	1 Ld. Raym. 515	165
Cannan *v.* Reynolds	5 E. & B. 301	766
Capron *v.* Capron	Law Rep. 17 Eq. 288	684
Carey *v.* Goodinge	3 Bro. C. C. 110	166
Carter *v.* Taggart	16 Sim. 423	956
Cashin *v.* Craddock	2 Ch. D. 140	325
Catlin *v.* Brown	11 Hare, 372	557
Caton *v.* Caton	Law Rep. 1 Ch. 137	331
Chaffers *v.* Headlam	9 Hare, App. xlvi.	420
Chalmer *v.* Bradley	1 Jac. & W. 51	861
Chapman *v.* Brown	6 Ves. 404	955
Chapman's Will, In re	32 Beav. 382	668
Chasemore *v.* Richards	7 H. L. C. 349	855
Chesterfield Colliery Company *v.* Black	24 W. R. 783	439
Child *v.* Douglas	2 Jur. (N.S.) 950	867
Christie *v.* Christie	Law Rep. 8 Ch. 499	9
Christopherson *v.* Naylor	1 Mer. 320	664
City Bank Case	3 D. F. & J. 629	902
City of London Brewery *v.* Tennant	Law Rep. 9 Ch. 212	793
Clark *v.* School Board for London	Law Rep. 9 Ch. 120	970
Clarke *v.* Collis	9 H. L. C. 601	271
——— *v.* Cookson	2 Ch. D. 746	658
——— *v.* Rugge	2 Roll. Abr. 60, pl. 17	971
Coal Consumers Association, In re	4 Ch. D. 625	678
Cock *v.* Cock	21 W. R. 807	875

		PAGE
Cockshott *v.* Cockshott	2 Coll. 432	874
Coffin *v.* Cooper	6 Ves. 514	9
Cohen, Ex parte	Law Rep. 7 Ch. 20	543
Colman *v.* Eastern Counties Railway Company	10 Beav. 1	473
Colquhoun, Re	1 Sm. & Giff. App. 1; 5 D. M. & G. 35	246
Cooke, Ex parte	4 Ch. D. 123	773
——— *v.* Farrand	7 Taunt. 121	385
——— *v.* Greeves	30 Beav. 378	766
Cooper, Ex parte	10 Ch. D. 313	546
——— *v.* Cooper	Law Rep. 7 H. L. 53	444
——— *v.* Marshall	Burr. 259	827
Cope *v.* Evans	Law Rep. 18 Eq. 138	671
Corbet's Case	7 Rep. 5, a.	810
Cork (Earl of) *v.* Russell	Law Rep. 13 Eq. 210	693
Cowbridge Railway Company, In re	Law Rep. 5 Eq. 413	696
Cox, Ex parte	2 M. D. & D. 486	694
Crabtree *v.* Bramble	3 Atk. 680	348
Cracknall *v.* Janson	6 Ch. D. 735	551
Craven *v.* Ryder	6 Taunt. 433	566
Crawshay *v.* Eades	1 B. & C. 181	71
Creyke's Case	Law Rep. 5 Ch. 63	389
Crispin, Ex parte	Law Rep. 8 Ch. 374	301
Croft *v.* Graham	2 D. J. & S. 155	236
Crompe *v.* Barrow	4 Ves. 601	964
Crooke *v.* De Vandes	11 Ves. 330	268
Crookhaven Mining Company, In re	Law Rep. 3 Eq. 69	142
Cross *v.* Lewis	2 B. & C. 686; 4 D. & R. 234	854
Crowther, Ex parte	24 L. T. (N.S.) 330	870
Crump *v.* Lambert	Law Rep. 3 Eq. 409	854
Cubitt *v.* Porter	8 B. & C. 257	413
Cunningham *v.* Moody	1 Ves. Sen. 174	654
Cunynghame's Settlement, In re	Law Rep. 11 Eq. 324	647
Curriers' Company *v.* Corbett	2 Dr. & Sm. 355; 4 D. J. & S. 764	147

D.

		PAGE
D'Abbacthie *v.* Bizoin	Ir. Rep. 5 Eq. 205	965
Dalglish *v.* Harvie	2 Mac. & G. 231	368
Daniel *v.* Hanslip	2 Lev. 67	810
Daniels *v.* Davison	16 Ves. 249; 17 Ves. 433	335
Dart, Ex parte	2 D. & Ch. 543	726
Davies *v.* Ashford	15 Sim. 42	348
——— *v.* Boulcott	1 Dr. & Sm. 23	420
——— *v.* Jenkins	6 Ch. D. 728	689
——— *v.* Marshall	10 C. B. (N.S.) 697	792
——— *v.* Sear	Law Rep. 7 Eq. 427	335, 793
Davis *v.* Ashwin	47 L. J. (Ch.) 70; 26 W. R. 139	204
Dawes *v.* Hawkins	8 C. B. (N.S.) 848	331
Dawkins *v.* Penrhyn (Lord)	6 Ch. D. 318	286
Day *v.* Spoone	Sir W. Jones, 375; Cro. Car. 432	810
Dean *v.* Bennett	Law Rep. 6 Ch. 489	356
Dearle *v.* Hall	3 Russ. 1	200
De Mattos *v.* Gibson	4 De G. & J. 276	431
De Moleyn's Case	1 Roll. Abr. 892, pl. 14, 16	694
Dennett *v.* Atherton	Law Rep. 7 Q. B. 316	84

		PAGE
Denny *v.* Hancock	Law Rep. 6 Ch. 1	970
De Serre *v.* Clarke	Law Rep. 18 Eq. 587	747
De Trafford *v.* Tempest	21 Beav. 564	956
Dickin, Ex parte	8 Ch. D. 377	281, 531
Dickinson *v.* Dodds	2 Ch. D. 463	429
Dickman *v.* Allen	2 Vent. 138	810
Dickson's Trusts, In re	1 Sim. (N.S.) 37	966
Dixon *v.* Clark	5 C. B. 365	304
—— *v.* Gayfere	17 Beav. 433	347
—— *v.* Yates	5 B. & Ad. 313	71
Dobson *v.* Land	4 De G. & Sm. 575	402
Doe *v.* Browne	8 East, 165; S. C. 14 Ves. 156	131
—— *v.* Challis	18 Q. B. 231; 7 H. L. C. 531	964
—— *v.* Eyre	5 C. B. 713	964
—— *v.* Manning	9 East, 59	8
Dovaston *v.* Payne	2 Sm. L. C. 136	335
Drinkwater *v.* Ratcliffe	Law Rep. 20 Eq. 528	80
Drummond *v.* Drummond	Law Rep. 2 Ch. 32	603
Dryden *v.* Frost	3 My. & Cr. 670	64
Dublin Exhibition Palace Company, In re	Ir. L. R. 2 Eq. 158	678
Duckett *v.* Gover	6 Ch. D. 82	103
Duffy's Trust, In re	28 Beav. 386	780
Dumas, Ex parte	1 Atk. 232	776
Dunkley *v.* Dunkley	2 D. M. & G. 390	780
Durell *v.* Pritchard	Law Rep. 1 Ch. 244	148, 793
Durent, Ex parte	Buck, 201	872

E.

East Anglian Railways Company *v.* Eastern Counties Railway Company	11 C. B. 775	501
Eastern Counties Railway Company *v.* Hawkes	5 H. L. C. 331	487
Eastwood *v.* Lever	4 D. J. & S. 114	868
Easum *v.* Appleford	5 My. & Cr. 56	956
Edmunds *v.* Waugh	Law Rep. 1 Eq. 418	237
Egerton *v.* Brownlow (Earl)	4 H. L. C. 1	965
Elliotson *v.* Feetham	2 Bing. N. C. 134; 2 Scott, 174	854
Ellis, Ex parte	2 Ch. D. 797	59
—— *v.* Silber	Law Rep. 8 Ch. 83	281
Ellis' Trusts, In re	Law Rep. 17 Eq. 409	648
Emanuel *v.* Bridger	Law Rep. 9 Q. B. 286	223
Emma Silver Mining Company, In re	Law Rep. 10 Ch. 194	258
Enohin *v.* Wylie	10 H. L. C. 1	523
Erskine *v.* Garthshore	18 Ves. 114	9
Exton *v.* Scott	6 Sim. 31	9
Eykyn's Trusts, In re	6 Ch. D. 115	444

F.

Fairclough *v.* Marshall	4 Ex. D. 37	276
Faithfull *v.* Ewen	7 Ch. D. 495	946
Falkner *v.* Butler	Amb. 514	956
Farina, In re	26 W. R. 261	671
Farmer *v.* Russell	1 B. & P. 296	194
Ferrand *v.* Wilson	4 Hare, 344	430

		PAGE
Fielden *v.* Slater	Law Rep. 7 Eq. 523	275
Fielding *v.* Wren	Cary, 65	810
Filewood *v.* Palmer	Moseley, 169	827
Fire Annihilator Company, In re	32 Beav. 561	708
Fisk *v.* Attorney-General	Law Rep. 4 Eq. 521	954
Fitzgerald *v.* Fitzgerald	Law Rep. 2 P. C. 83	165
Fitzmaurice *v.* Bayley	9 H. L. C. 78	131
Fleet *v.* Perrins	Law Rep. 4 Q. B. 500	444
Fletcher, Ex parte	9 Ch. D. 381	282
——— *v.* Fletcher	4 Hare, 67	8
Flight *v.* Thomas	11 A. & E. 688; 8 Cl. & F. 231	854
Folkhard *v.* Hemmett	5 T. R. 417, n.	829
Forester *v.* Read	Law Rep. 6 Ch. 40	9
Forrest *v.* Manchester, &c., Railway Company	30 Beav. 40	461
Foss *v.* Harbottle	2 Hare, 461	102
Foster's Case	11 Rep. 63, a.	632
Fowler *v.* Wyatt	24 Beav. 232	126
Fox *v.* Fox	Law Rep. 19 Eq. 286	408
Freeman *v.* Pope	Law Rep. 5 Ch. 538	9
Frith *v.* Cartland	2 H. & M. 417	773
Frowd's Settlement, In re	10 L. T. (N.S.) 367; 4 N. R. 54	747
Fry *v.* Capper	Kay, 163	647, 962
Furness *v.* Booth	4 Ch. D. 586	394

G.

Galloway *v.* London (Corporation of)	3 D. J. & S. 59	577, 851
Garbutt *v.* Fawcus	1 Ch. D. 155	31
Gardner *v.* Fremantle	19 W. R. 256	357
——— *v.* Marshall	14 Sim. 575	780
Garling *v.* Royds	25 W. R. 123	241, 659
Garrard *v.* Lauderdale (Lord)	2 Russ. & My. 451	8
Gaunt *v.* Fynney	Law Rep. 8 Ch. 8	860
General Estates Company, In re	Law Rep. 3 Ch. 758	379
General Provident Assurance Company, In re	Law Rep. 14 Eq. 507	582
General South American Company, In re	2 Ch. D. 337	588
Geo *v.* Cother	Sid. 106; 1 Keb. 390	828
Gibbes, Ex parte	1 Ch. D. 101	563
Gibson *v.* Carruthers	8 M. & W. 321	566
——— *v.* Fisher	Law Rep. 5 Eq. 51	881
Gilbert *v.* Endean	9 Ch. D. 259	766
——— *v.* Smith	2 Ch. D. 686	213
Gilbertson *v.* Richards	4 H. & N. 277; 5 H. & N. 453	430
Glover *v.* Lane	3 T. R. 445	827
Godfrey *v.* Tucker	33 Beav. 280	696
Goldsmid *v.* Cazenove	7 H. L. C. 785	319
Gooding *v.* Read	4 D. M. & G. 510	964
Goodwin *v.* Robarts	1 App. Cas. 476	318
Gordon, In re	6 Ch. D. 531	347
Gould *v.* Kemp	2 My. & K. 304	268
Gout *v.* Aleploglu	6 Beav. 69, n.	251
Graham *v.* Campbell	7 Ch. D. 490	325
Grant *v.* Gunner	1 Taunt. 435	811
Gray *v.* Lewis	Law Rep. 8 Ch. 1049	102
Great Ship Company, In re	4 D. J. & S. 63	678
Green *v.* Beesley	2 Bing. N. C. 108	264

		PAGE
Greenway, Ex parte	Law Rep. 16 Eq. 619	223
Grey *v.* Friar	4 H. L. C. 565	574
Griesbach *v.* Fremantle	17 Beav. 314	347

H.

Hale *v.* Hale	3 Ch. D. 643	557
Hall *v.* Byron	4 Ch. D. 667	827
Hammond *v.* Anderson	1 B. & P. (N. R.) 69	70
Hampton *v.* Holman	5 Ch. D. 183	963
Hancock *v.* Guerin	4 Ex. D. 3	325
Hansen *v.* Miller	14 Sim. 22	443
Hanson *v.* Meyer	6 East, 614	71
Harcourt *v.* Seymour	2 Sim. (N.S.) 12	347, 643
Harding *v.* Wilson	2 B. & C. 96	971
Harloe *v.* Harloe	Law Rep. 20 Eq. 471	441
Harries' Trusts, In re	Joh. 199	956
Harrington *v.* Price	3 B. & Ad. 170	402
Harris, Ex parte	De G. 162	769
Harrison *v.* Burton	1 J. & H. 287	268
——— *v.* Grimwood	12 Beav. 192	408
Hasluck *v.* Pedley	Law Rep. 19 Eq. 271	684
Hatton *v.* Haywood	Law Rep. 9 Ch. 229	693
Hawkins *v.* Gathercole	6 D. M. & G. 1	735
——— *v.* Parsons	8 Jur. 452	944
Hayes, In re	9 W. R. 769	654
——— *v.* Hayes	4 Russ. 311	963
Haynes *v.* Cooper	33 Beav. 431	946
Haytor Granite Company, In re	Law Rep. 1 Ch. 77	143
Head *v.* Egerton	3 P. Wms. 280	401
Heasman *v.* Pearse	Law Lep. 7 Ch. 275	881
Heath *v.* Crealock	Law Rep. 10 Ch. 82	402
Henderson *v.* Fitzgerald	4 H. L. C. 484	971
Hersey *v.* Giblett	18 Beav. 174	131
Hervey *v.* Smith	1 K. & J. 389; 22 Beav. 299	335, 792
Hesketh *v.* Blanchard	4 East, 144	264
Hewitt *v.* Dacre (Lord)	2 Keen, 622	964
Highgate Archway Company *v.* Jeakes	Law Rep. 12 Eq. 9	430
Hill *v.* Hibbit	Law Rep. 14 Eq. 221	208
Hinde *v.* Blake	5 Beav. 431	169
Hoare, Ex parte	Law Rep. 16 Eq. 625	542
——— *v.* Osborne.	Law Rep. 1 Eq. 585	952
Hodges, In re	7 Ch. D. 754	273
Honey, Ex parte	Law Rep. 7 Ch. 178	319
Hopkins *v.* Clarke	4 B. & S. 836; 5 B. & S. 753	732
Hopkinson *v.* Exeter (Marquis of)	Law Rep. 5 Eq. 63	357
Hornby *v.* Matcham	16 Sim. 325	402
Hoskins *v.* Robbins	1 Vent. 163	810
Hotchkiss' Trusts, In re	Law Rep. 8 Eq. 643	664
Howell *v.* Richards	11 East, 633	84
Hughes *v.* Metropolitan Board of Works	9 W. R. 517	840
Humphreys *v.* Humphreys	Law Rep. 4 Eq. 475	875
Hunter *v.* Cheshire	Law Rep. 8 Ch. 751	664
Huntley *v.* Griffith	F. Moore, 452	446
Hurdman *v.* North Eastern Railway Company	3 C. P. D. 168	783
Hutton *v.* Simpson	2 Vern. 722	874
Hyde & Co.'s Trade-Mark, In re	7 Ch. D. 724	672

I.

		PAGE
Imperial Bank of China, In re	Law Rep. 1 Ch. 339	103, 707
Imperial Mercantile Credit Association *v.* Coleman	Law Rep. 6 H. L. 189	586, 937
Imperial Steam Company, In re	37 L. J. (Ch.) 517	678
Incorporated Church Building Society *v.* Coles	1 K. & J. 145; 5 D. M. & G. 324	953
International Pulp and Paper Company, In re	6 Ch. D. 556	582
Ivory, In re	10 Ch. D. 372	742

J.

James *v.* Griffin	2 M. & W. 623	570
—— *v.* James	Law Rep. 16 Eq. 153	205
Jeaffreson's Trusts, In re	Law Rep. 2 Eq. 276	956
Jee *v.* Audley	1 Cox, 324	963
Jerningham, Ex parte	9 Ch. D. 466	726
Joel *v.* Mills	3 K. & J. 458	963
Johnstone *v.* Hall	2 K. & J. 414	275
Joint Stock Discount Company, In re	15 W. R. 99	259
Jones *v.* Jones	8 M. & W. 431	71
—— *v.* Lewis	2 Ves. Sen. 240	402
—— *v.* Ogle	Law Rep. 8 Ch. 192	684
—— *v.* Richards	6 A. & E. 530	810
—— *v.* Smith	1 Ph. 244	331
Joselyne, Ex parte	8 Ch. D. 327	161, 223, 946

K.

Kay *v.* Oxley	Law Rep. 10 Q. B. 360	969
Keates *v.* Lyon	Law Rep. 4 Ch. 218	868
Kennedy *v.* Kennedy	10 Hare, 438	385
Keppell *v.* Bailey	2 My. & K. 517	430
Kidgill *v.* Moor	9 C. B. 364	861
Kidwelly *v.* Brand	Plow. 72	276
King's Leasehold Estates, In re	Law Rep. 16 Eq. 521	131
Kirby *v.* Ladgrove	1 B. & P. 13	827
Kirkwood *v.* Thompson	2 H. & M. 400	287
Krehl *v.* Burrell	7 Ch. D. 551; 11 Ch. D. 146	793

L.

Lake *v.* Plaxton	10 Ex. 196	827
Langley *v.* Hammond	Law Rep. 3 Ex. 161	969
Lantsbury *v.* Collier	2 K. & J. 709	430
Lascelles *v.* Onslow (Lord)	2 Q. B. D. 433	827
Laurie *v.* Wilson	Law Rep. 10 C. P. 152	209
Lea *v.* Church	3 W. R. 603	780
Leake *v.* Robinson	2 Mer. 363	407, 557
Learoyd, Ex parte	10 Ch. D. 3	59, 726
Lee *v.* Olding	25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850	747
Leech *v.* Schweder	Law Rep. 9 Ch. 463	793
Le Heup, Ex parte	18 Ves. 221	9

		PAGE
Leman, Ex parte	4 Ch. D. 23	542
Levi & Co.'s Case	Law Rep. 7 Eq. 449	92
Lewis, Ex parte	3 M. D. & D. 93	726
——— *v.* Hillman	3 H. L. C. 607	235
Lickbarrow *v.* Mason	Sm. L. C. 7th Ed. vol. i. p. 818	570
Lindenau *v.* Desborough	8 B. & C. 586	367
Lingen *v.* Simpson	6 Madd. 290	324
Littlehampton, &c., Steam Company, In re	2 D. J. & S. 521	705
Llanelly Railway and Dock Company *v.* London and North Western Railway Company	Law Rep. 7 H. L. 550	962
Lloyd *v.* Lloyd	4 Beav. 231	956
——— *v.* Pughe	Law Rep. 8 Ch. 88	443
Locke *v.* Crosse	1 Salk. 305; 2 Lev. 72; 3 Keb. 116	165
Locking *v.* Parker	Law Rep. 8 Ch. 30	287
Lomax *v.* Stott	39 L. J. (Ch.) 834	784
London and Mercantile Discount Company, In re	Law Rep. 1 Eq. 277	707
London and Provincial Bank *v.* Bogle	7 Ch. D. 773	689
London Cotton Company, In re	Law Rep. 2 Eq. 53	678
London Cotton Mills Company, In re	25 W. R. 109	223
London Flour Company, In re	16 W. R. 474, 552	708
London Suburban Bank, In re	Law Rep. 6 Ch. 641	378
Loring *v.* Thomas	1 Dr. & Sm. 497	665
Loveridge *v.* Cooper	3 Russ. 30	202
Lowe *v.* Blakemore	Law Rep. 10 Q. B. 485	223
Lucas *v.* Dennison	13 Sim. 584	287
Luccraft *v.* Hite	2 Hare, 14, n.	401
Luker v. Dennis	7 Ch. D. 227	430
Lyons, Ex parte	Law Rep. 7 Ch. 494	149
——— *v.* Blenken	Jac. 245	273, 515

M.

Macdonald *v.* Law Union Fire and Life Insurance Company	Law Rep. 9 Q. B. 238	366
MacDougall *v.* Gardiner	1 Ch. D. 13	102, 112
M'Gregor *v.* M'Gregor	1 D. F. & J. 63	882
Mackenzie *v.* Mackenzie	5 De G. & Sm. 338	169
Magrath *v.* Hardy	4 Bing. N. C. 782	225
Mair *v.* Glennie	4 M. & S. 240	264
Man *v.* Ricketts	3 De G. & Sm. 446	448
Mann *v.* Stephens	15 Sim. 377	868
Marine Mansions Company, In re	Law Rep. 4 Eq. 601	582, 756
Marner *v.* Bright	11 Ch. D. 394, n.	394
Martin *v.* Holgate	Law Rep. 1 H. L. 175	666, 882
Mason, In re	8 Ch. D. 411	893
Master *v.* Hansard	4 Ch. D. 718	868
Matts *v.* Hawkins	5 Taunt. 20	413
May *v.* Bennett	1 Russ. 370	893
Menier *v.* Hooper's Telegraph Works	Law Rep. 9 Ch. 350	103
Mercer *v.* Woodgate	Law Rep. 5 Q. B. 26	335
Merry *v.* Nickalls	Law Rep. 8 Ch, 205	139
Metropolitan Association *v.* Petch	5 C. B. (N.S.) 504	861
Michael's Trusts, In re	46 L. J. (Ch.) 651	647
Middleton *v.* Chichester	Law Rep. 6 Ch. 152	186

		PAGE
Middleton *v.* Pollock	4 Ch. D. 49	773
Midland Railway Company *v.* Great Western Railway Company	Law Rep. 8 Ch. 841	454
Midleton (Lord) *v.* Eliot	15 Sim. 531	401
Milbourne *v.* Ewart	5 T. R. 381	165
Mildmay *v.* Quicke	6 Ch. D. 553	653
Miles *v.* Gorton	2 C. & M. 504	71
——— *v.* Harrison	Law Rep. 9 Ch. 316	441
——— *v.* Tobin	16 W. R. 465	793
Miller *v.* Thomson	3 Man. & G. 576	318
Mills *v.* Drewitt	20 Beav. 632	893
Milner, Ex parte	3 Dea. & Ch. 235	872
——— *v.* Milnes	3 T. R. 627	444
Mirabita *v.* Imperial Ottoman Bank	3 Ex. D. 164	563
Mitchell *v.* Reynolds	1 P. Wms. 181	965
Moens *v.* Heyworth	10 M. & W. 147	368
Moffatt *v.* Farquhar	7 Ch. D. 591	103
Monypenny *v.* Dering	2 D. M. & G. 145	964
Moore *v.* Rawson	3 B. & C. 332	854
Morland *v.* Cook	Law Rep. 6 Eq. 252	793
Morley *v.* White	Law Rep. 8 Ch. 214	149
Morris *v.* Freeman	3 P. D. 65	517
——— *v.* ———	27 W. R. 62	689
Morris' Case	Law Rep. 7 Ch. 200	389
Morrison *v.* Musprat	4 Bing. 60	367
Moseley's Trusts, In re	Law Rep. 11 Eq. 499	556
Moss *v.* Barton	Law Rep. 1 Eq. 474	131
Mostyn *v.* West Mostyn Coal and Iron Company	1 C. P. D. 145	27
Motion, In re	Law Rep. 9 Ch. 192	149
Mozley *v.* Alston	1 Ph. 790	102
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	631
Munt *v.* Shrewsbury and Chester Railway Company	13 Beav. 1	487
Musgrave *v.* Cave	Willes, 319	810
Mutlow *v.* Bigg	1 Ch. D. 385	347

N.

Nash *v.* Nash	2 Madd. 133	444
National Deposit Bank, Ex parte	26 W. R. 375	726
National Funds Assurance Company, In re	4 Ch. D. 305	119
Native Iron Ore Company, In re	2 Ch. D. 345	581
Neate *v.* Marlborough (Duke of)	3 My. & Cr. 407	693
Nevell *v.* Hancerton	1 Lev. 62; 2 Inst. 476; 4 Inst. 298	828
Nevill *v.* Hamerton	1 Sid. 79	827
New Sombrero Company *v.* Erlanger	5 Ch. D. 73; 3 App. Cas. 1218	709, 936
Newall, Ex parte	3 Deac. 333	725
Newton *v.* Chorlton	10 Hare, 646; 2 Drew. 333	92
——— *v.* Taylor	Law Rep. 19 Eq. 14	944
Nichols *v.* Marsland	2 Ex. D. 1	783
Nicholson *v.* Drury Buildings Estate Company	7 Ch. D. 48	164, 443
Nokes *v.* Warton	5 Beav. 448	153
Norman's Trust, Re	3 D. M. & G. 965	270

		PAGE
North London Railway Company *v.* Metropolitan Board of Works	Joh. 405	841
Norton *v.* Florence Land and Public Works Company	7 Ch. D. 332	756
——— *v.* Russell	Law Rep. 19 Eq. 343	944

O.

Ogg *v.* Shuter	1 C. P. D. 47	564
Ogilvie *v.* Jeaffreson	2 Giff. 253	531
Oke *v.* Heath	1 Ves. Sen. 135	956
Oldershaw *v.* King	2 H. & N. 517	8
Oldfield *v.* Round	5 Ves. 508	335
Orr Ewing's Trade-Marks, In re	8 Ch. D. 794	252

P.

Packer *v.* Welsted	2 Sid. 111	972
Pannell, Ex parte	6 Ch. D. 335	281
Paragon and Spero Mining Company, In re	10 W. R. 76	906
Parsons *v.* Gulliford	10 Jur. (N.S.) 231	665
Partridge *v.* Scott	3 M. & W. 220	860
Pascal, Ex parte	1 Ch. D. 509	300
Patrick *v.* Stubbs	9 M. & W. 830	827
Peacock, Ex parte	Law Rep. 8 Ch. 682	870
Pearson *v.* Spencer	1 B. & S. 571; 3 B. & S. 761	972
Pennell *v.* Deffell	4 D. M. & G. 372	773
Perkins *v.* Cooke	2 J. & H. 393	893
Phillips *v.* Phillips	4 D. F. & J. 208	335
——— *v.* ———	10 Jur. (N.S.) 1173	665
Phipson *v.* Harvett	1 C. M. & R. 473	632
Picard *v.* Hine	Law Rep. 5 Ch. 274	689
Picken *v.* Matthews	10 Ch. D. 264	559
Pilley *v.* Baylis	5 Ch. D. 241	241
Pindar *v.* Wadsworth	2 East, 154	829
Pinto Silver Mining Company, In re	8 Ch. D. 273	141
Platel *v.* Bevill	2 Ex. 511	51
Pledge *v.* Buss	Joh. 663	92
Porter *v.* Shephard	6 T. R. 665	574
Potter's Trusts, In re	Law Rep. 8 Eq. 52	664
Pratt *v.* Harvey	Law Rep. 12 Eq. 544	952
Preston *v.* Dania	Law Rep. 8 Ex. 19	165
——— *v.* Melville	15 Sim. 35; 8 Cl. & F. 1	523
Price *v.* Berrington	11 Beav. 90	420
Prince *v.* Oriental Bank Corporation	3 App. Cas. 325	318
Printing and Numerical Registering Company, In re	8 Ch. D. 535	678, 756
Prole *v.* Soady	Law Rep. 3 Ch. 220	444
Pruen *v.* Osborne	11 Sim. 132	881
Pulsford *v.* Hunter	3 Bro. C. C. 416	408
Punsany and Leader's Case	1 Leon. 11	810

R.

Raggett *v.* Findlater	Law Rep. 17 Eq. 29	251
Railway Steel and Plant Company, In re	8 Ch. D. 183	678
Ramsden *v.* Lupton	Law Rep. 9 Q. B. 17	543

		PAGE
Redhead *v.* Welton	29 Beav. 521	225
Reg. *v.* Darlington School (Governors of)	14 L. J. (Q.B.) 67	357
—— *v.* Wilson	18 Q. B. 348	335
Rex *v.* Barr	4 Camp. 16	335
—— *v.* Calvert	2 C. & M. 189	169
—— *v.* Ringstead (Inhabitants of)	9 B. & C. 218	874
Reynolds, In re	3 Ch. D. 61	653
——, ——	10 W. R. 709	169
Rice *v.* Wiseman	3 Bulst. 82	827
Richards *v.* Richards	2 B. & Ad. 447	165
Richardson *v.* Younge	Law Rep. 10 Eq. 275; Ibid. 6 Ch. 478	287
Richter *v.* Laxton	27 W. R. 214	225
Rigg *v.* Lonsdale (Earl of)	1 H. & N. 923	811
Rigley's Trusts, In re	36 L. J. (Ch.) 147	952
Roach *v.* Wadham	6 East, 289	293
Roberts *v.* Hunt	15 Q. B. 17	335
Robertson *v.* Southgate	5 Hare, 223	437
Robinson *v.* Preston	4 K. & J. 505	268
—— *v.* Sykes	23 Beav. 40	881
—— *v.* Wood	4 Jur. (N.S.) 625	964
Roderick *v.* Aston Local Board	5 Ch. D. 328	840
Roe *v.* Galliers	2 T. R. 133	430
—— *v.* Summerset	5 Burr. 2608	875
Ross, Ex parte	6 Ves. 802	769
—— *v.* Ross	20 Beav. 645	881
Ruffle, Ex parte	Law Rep. 8 Ch. 997	871
Rumble *v.* Heygate	18 W. R. 749	970
Runnacles *v.* Mesquita	1 Q. B. D. 416	31
Rush, In re	Law Rep. 10 Eq. 442	695
Ryall *v.* Rolle	1 Atk. 165	776

S.

St. Helen's Smelting Company *v.* Tipping	11 H. L. C. 642	860
St. Mary Magdalen College *v.* Attorney-General	3 Jur. (N.S.) 675	861
St. Thomas' Dock Company, In re	2 Ch. D. 116	378
Saunders *v.* Vautier	4 Beav. 115; Cr. & Ph. 240	409
Savin, In re	Law Rep. 7 Ch. 760	64
Sayers, Ex parte	5 Ves. 169	310, 776
Scales *v.* Pickering	4 Bing. 448	429
Schotsmans *v.* Lancashire and Yorkshire Railway Company	Law Rep. 2 Ch. 332	567
Schulte, Ex parte	Law Rep. 9 Ch. 409	735
Schweitzer *v.* Mayhew	31 Beav. 37	287
Scott *v.* Spashett	3 Mac. & G. 599	780
—— *v.* Surman	Willes, 400	776
Scrutton *v.* Pattillo	Law Rep. 19 Eq. 360	444
Seaman *v.* Wood	22 Beav. 591	557
Seixo *v.* Provezende	Law Rep. 1 Ch. 192	671
Sharp *v.* Bechinowe	Lutw. 398	806
—— *v.* Taylor	2 Ph. 801	186
Shelley *v.* Westbrooke	Jac. 266, n.	516
Shelmardine *v.* Harrop	6 Madd. 39	402
Shepherd *v.* Harrison	Law Rep. 5 H. L. 116	566
Sheppard *v.* Oxenford	1 K. & J. 491	186

		PAGE
Shrewsbury and Birmingham Railway Company *v.* London and North Western Railway Company	6 H. L. C. 113	487
Sibley *v.* Perry	7 Ves. 522	880
Simmons *v.* Swift	5 B. & C. 857	71
Simpson, Ex parte	1 Atk. 70	870
——, ——	15 Ves. 476	9
—— *v.* Denison	10 Hare, 51	474
—— *v.* Westminster Palace Hotel Company	8 H. L. C. 712; 2 D. F. & J. 141	454, 461
Sinclair *v.* Wilson	20 Beav. 324	310
Singer Manufacturers *v.* Wilson	3 App. Cas. 376	658
Sinnett *v.* Herbert	Law Rep. 7 Ch. 232	952
Sisson *v.* Giles	3 D. J. & S. 614	348, 642
Skrymsher *v.* Northcote	1 Sw. 566	956
Slubey *v.* Heyward	2 H. Bl. 504	70
Smith *v.* Bicknell	3 V. & B. 51, n.	402
—— *v.* Buller	Law Rep. 19 Eq. 473	208
—— *v.* Fletcher	Law Rep. 9 Ex. 64; 2 App. Cas. 781	783
—— *v.* Hill	9 Ch. D. 143	238
—— *v.* Horsfall	25 Beav. 628	881
—— *v.* Hurst	10 Hare, 30	696
—— *v.* Kenrick	7 C. B. 515	783
—— *v.* Smith	12 Sim. 317	271
—— *v.* ——	Law Rep. 5 Ch. 342	557
—— *v.* ——	3 Giff. 121	780
Smith's Trusts, In re	5 Ch. D. 497, n.	665
——, ——	Law Rep. 1 Eq. 79	875
Smyth *v.* North	Law Rep. 7 Ex. 242	909
Society of Practical Knowledge *v.* Abbot	2 Beav. 559	709
South Wales Atlantic Steamship Company, In re	2 Ch. D. 763	184
Spencer *v.* Wilson	Law Rep. 16 Eq. 501	408
Spencer's Case	5 Rep. 16, a.	430
Spiller *v.* Paris Skating Rink Company	7 Ch. D. 368	103
Spirett *v.* Willows	3 D. J. & S. 293	9
Spratt's Patent *v.* Ward	11 Ch. D. 240	657
Squires *v.* Ashford	23 Beav. 132	780
Stammers *v.* Dixon	7 East, 200	828
Standard Bank of British South America *v.* Stokes	9 Ch. D. 68	413
Stanhope Silkstone Collieries Company, In re	11 Ch. D. 160	946
Stansfield *v.* Hobson	16 Beav. 236; 3 D. M. & G. 620	293
Stead's Mortgaged Estates, In re	2 Ch. D. 713	236
Steam Stoker Company, In re	Law Rep. 19 Eq. 416	41
Stephens, Ex parte	2 Mont. & A. 31	64
Stevens, Ex parte	Law Rep. 20 Eq. 786	543
—— *v.* Gourly	7 C. B. (N.S.) 99	414
—— *v.* Hale	2 Dr. & Sm. 22	877
Stocker *v.* Brockelbank	3 Mac. & G. 250	264
—— *v.* Dean	16 Beav. 161	430
Stockton Iron Furnace Company, In re	10 Ch. D. 335	756
Stokoe *v.* Robson	3 V. & B. 51; 19 Ves. 385	402
Stone, Ex parte	Law Rep. 8 Ch. 914	319
Stourbridge Canal Company *v.* Wheeley	2 B. & Ad. 792	429
Stradling *v.* Morgan	Plowd. 199	735
Sutton, Ex parte	11 Ves. 163	871

		PAGE
Sutton *v.* Norwich (Corporation of)	27 L. J. (Ch.) 739	840
Swindell *v.* Birmingham Syndicate	3 Ch. D. 127	241
Swinfen *v.* Swinfen	1 C. B. (N.S.) 364; 2 De G. & J. 381	766

T.

Tanner *v.* Scovell	14 M. & W. 28	71
Tarbottom *v.* Earle	11 W. R. 680	894
Taunton *v.* Royal Insurance Company	2 H. & M. 135	480
Taylor *v.* Chichester and Midhurst Railway Company	Law Rep. 4 H. L. 628	487
——— *v.* Oldham (Corporation of)	4 Ch. D. 395	848
——— *v.* Plumer	3 M. & S. 562	773
Teague's Settlement, In re	Law Rep. 10 Eq. 564	650
Tenant *v.* Elliott	1 B. & P. 3	186
Tennant *v.* Braie	Tothill, 141	966
Thomas *v.* Hayward	Law Rep. 4 Ex. 311	276
Thomson *v.* Thomson	7 Ves. 470	184
Thornton *v.* Bright	2 My. & Cr. 230	647
Tidd *v.* Lister	10 Hare, 140	780
Tinkler *v.* Wandsworth District Board of Works	2 De G. & J. 274	633
Tootal's Estate, In re	2 Ch. D. 628	893
Traiton *v.* Traiton	1 Vern. 413	966
Triquet *v.* Thornton	13 Ves. 345	348
Trulock *v.* Robey	12 Sim. 402	287
Tulk *v.* Moxhay	2 Ph. 774	275, 431
Turner *v.* Trustees of Liverpool Docks	6 Ex. 543	566
Twycross *v.* Grant	23 Sol. J. 298	871

U.

Underwood, In re	3 K. & J. 745	293
Upton *v.* Ferrers (Lord)	5 Ves. 800	875

V.

Vale *v.* Oppert	5 Ch. D. 633	743
Valpy & Chaplin, Ex parte	Law Rep. 7 Ch. 289	581
——— *v.* Gibson	4 C. B. 837	563
Vaughan *v.* Buck	1 Sim. (N.S.) 284	780
Venour's Settled Estates, In re	2 Ch. D. 522	465
Verral *v.* Robinson	2 C. M. & R. 495	224
Viney *v.* Chaplin	2 De G. & J. 468	530
Vizard's Trusts, In re	Law Rep. 1 Ch. 588	747
Vorley *v.* Cooke	1 Giff. 230	531

W.

Waddell *v.* Toleman	9 Ch. D. 212	282
Wade *v.* Coope	2 Sim. 155	92
Wake *v.* Conyers	1 Eden, 331	828
Walburn *v.* Ingilby	1 My. & K. 61	578
Wall *v.* City of London Real Property Company	Law Rep. 9 Q. B. 249	84

		PAGE
Wallis *v.* Morris	12 W. R. 997	696
Wallwyn *v.* Coutts	3 Mer. 707	8
Wankford *v.* Wankford	1 Salk. 299	164
Warden of Dover *v.* London, Chatham, and Dover Railway Company	3 D. F. & J. 559	472
Wardley, Ex parte	6 Ch. D. 790	915
Ware *v.* Polhill	11 Ves. 257	430
——— *v.* Regent's Canal Company	3 De G. & J. 212	471
Warren *v.* Rudall	4 K. & J. 603	735
Watkins *v.* Nash	Law Rep. 20 Eq. 262	8
Watmough's Trusts, In re	Law Rep. 8 Eq. 272	952
Watson *v.* Hayes	5 My. & Cr. 125	408
Watts *v.* Kelson	Law Rep. 6 Ch. 166	969
Way's Trusts, In re	2 D. J. & S. 365	9
Webb *v.* Bird	10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841	854
——— *v.* Whiffen	Law Rep. 5 H. L. 711	389
Welcome *v.* Upton	6 M. & W. 536	812
Wentworth *v.* Lloyd	10 Jur. (N.S.) 1113	448
West *v.* Orr	8 Ch. D. 60	664
West *v.* White	4 Ch. D. 631	241, 657
West Hartlepool Ironworks Company, In re	Law Rep. 10 Ch. 618	378
West Surrey Tanning Company, In re	Law Rep. 2 Eq. 737	708
Westbourne Grove Drapery Company, In re	5 Ch. D. 248	142
Western *v.* Macdermott	Law Rep. 1 Eq. 499; Ibid. 2 Ch. 72	428, 867
Western of Canada Oil, Land, and Works Company, In re	Law Rep. 17 Eq. 1	378
Westminster Brymbo Coal and Coke Company *v.* Clayton	36 L. J. (Ch.) 476	784
Weston *v.* Arnold	Law Rep. 8 Ch. 1084	414
Wetter *v.* Rucker	1 Brod. & B. 491	226
Whetstone *v.* Dewis	1 Ch. D. 99	906
White *v.* Hindley Local Board	Law Rep. 10 Q. B. 219	848
——— *v.* Simmons	Law Rep. 6 Ch. 555	281
Whitecomb *v.* Jacob	1 Salk. 161	773
Wilkins *v.* Fry	1 Mer. 244	124
Wilkinson *v.* Wilkinson	Law Rep. 12 Eq. 604	965
Williams *v.* Ayers	3 App. Cas. 133	318
——— *v.* Burrell	1 C. B. 402	86
——— *v.* Games	Law Rep. 10 Ch. 204	80
——— *v.* Hensman	1 J. & H. 546	268
——— *v.* Prince of Wales Life Assurance Society	23 Beav. 338	258
Wilson, Ex parte	Law Rep. 7 Ch. 490	319
——— *v.* Atkinson	4 D. J. & S. 455	270
——— *v.* Hart	Law Rep. 1 Ch. 463	275
——— *v.* Stanley	12 Ir. C. L. Rep. 345	861
——— *v.* Waddell	2 App. Cas. 95	783
——— *v.* West Hartlepool Railway Company	2 D. J. & S. 475	331
Winch *v.* Birkenhead, &c., Railway Company	7 Railw. Cas. 384; 5 De G. & Sm. 562	454, 638
Wingfield, Ex parte	10 Ch. D. 591	756
Wollaston *v.* King	Law Rep. 8 Eq. 165	957
Wolley *v.* Jenkins	23 Beav. 53; 3 Jur. (N.S.) 321	643
Wood *v.* Beard	2 Ex. D. 30	131

		PAGE
Wood *v.* Leadbitter	13 M. & W. 838	331
—— *v.* Saunders	Law Rep. 10 Ch. 582	969
—— *v.* Veal	5 B. & A. 454	331, 848
Woodman *v.* Higgins	14 Jur. 846	401
Wooldridge *v.* Norris	Law Rep. 6 Eq. 410	93
Wren *v.* Bradley	2 De G. & Sm. 49	965
Wright, In re	3 Ch. D. 70	542
—— *v.* Burroughes	3 C. B. 685	275
—— *v.* Callender	2 D. M. & G. 652	893
—— *v.* Williams	1 M. & W. 77	854
Wulfe *v.* Jay	Law Rep. 7 Q. B. 756	93
Wynn Hall Coal Company, In re	Law Rep. 10 Eq. 515	581

CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

CRACKNALL *v.* JANSON.

[1876 C. 171.]

C. A.
1878
FRY, J.
June 26, 27.
C. A.
1879
March 3, 4.

Fraudulent Deed—27 *Eliz. c.* 4—*Mortgage executed without Agreement and without Knowledge of Mortgagee*—*Recital*—*Estoppel*—*Mortgage*—*Consolidation*—*Scandalous Matter*—*Power of Court to strike out*—*Costs*—*Prolix Affidavits*—*Special Direction to Taxing Master*—*Additional Rules of Court, August*, 1875, *Order* VI., *r.* 18.

A mortgage executed in 1871 contained a recital that the mortgagor was indebted to the mortgagee in the sum of £1500 for moneys advanced by her to him, and that he had agreed to secure the payment of the same by the mortgage. The money had been advanced in 1864, and the evidence shewed that there was at that time no agreement for a mortgage, and that there had been no subsequent pressure by the lender. The mortgage deed was retained in the possession of the mortgagor, and there was nothing to shew that the mortgagee knew of its execution until February, 1874:—

Held, by *Fry*, J., and by the Court of Appeal, that the mortgage was void under 27 Eliz. c. 4, as against a mortgagee for value whose mortgage was

529

C. A.
1879
CRACKNALL
v.
JANSON.

13 Ch D 644
14 Ch D 549

executed in February, 1872, the recital of the agreement not operating as an estoppel against him.

Exton v. *Scott* (1) explained.

A mortgagee of two estates, *A.* and *B.*, of which *A.* was subject to a first mortgage, in exercise of a power of sale in his mortgage, sold the estate *A.* The first mortgagee, to whom another debt was due upon an equitable deposit of a policy of assurance and other documents by the mortgagor, refused to join in the conveyance to the purchaser, unless he received out of the purchase-money the amount due to him on both his mortgages. That amount was paid to him accordingly, and the documents comprised in the equitable deposit were delivered to the second mortgagee. The balance of the proceeds of sale was insufficient to discharge what was due to the second mortgagee:—

Held, by *Fry*, J., that, inasmuch as the second mortgagee was never the owner of the equitable mortgage, but it had been discharged out of the purchase-money, he had no right to consolidate the equitable mortgage with his other mortgage, and he was ordered to deliver up the deposited documents to the trustee in bankruptcy of the mortgagor.

Held, on appeal, that as the equitable mortgage was paid with money which, had the first mortgagee not claimed the right to consolidate, would have belonged to the second mortgagee, it was in fact paid by the second mortgagee, who by the fact of such payment became equitable transferee, and was entitled to consolidate that mortgage with his mortgage on estate *B.*

The Plaintiff having appealed from part of a judgment, and the Respondent having given a cross notice of appeal, *held*, that the judgment could be varied in the Plaintiff's favour on a point not mentioned in his notice of appeal:—

Held, by *Fry*, J., that the Court has power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, on the application of any person, even a stranger to the action, or *mero motu*. It is not necessary that an application should be made by the injured person.

Direction given to the Taxing Master under rule 18 of Order VI. of the Additional Rules of Court, August, 1875, to look into and to disallow the costs of affidavits of unnecessary length.

THIS was a foreclosure action by mortgagees. The Plaintiffs also claimed a declaration that a mortgage of prior date to theirs was fraudulent and void as against them, or otherwise that in the events which had happened it had become postponed to their mortgage.

On the 1st of January, 1867, *Joseph Turnley*, who was the owner in fee of a property at *Norwood*, called the *Selhurst Park* estate, containing about thirty-two acres, executed a mortgage of it to the

(1) 6 Sim. 31.

trustees of the *Guardian Life Assurance Company*, to secure the payment of £35,000 and interest.

On the 24th of June, 1870, *Joseph Turnley* executed a second mortgage of the *Selhurst Park* estate to *John James* and *W. M. Tuffnell*, trustees for the *Reliance Life Assurance Society*, to secure the payment of £6827 10*s.* and interest.

On the 15th of August, 1871, *Joseph Turnley* executed a third mortgage of the *Selhurst Park* estate to his step-daughter *Diana Pellowe* (who was a daughter of his second wife, formerly Mrs. *Pellowe*, by her first husband), to secure the payment of £1500 and interest. This mortgage contained a recital that *Turnley* was indebted to *Diana Pellowe* in the sum of £1500, for moneys advanced by her to him, and that he had agreed to secure the payment of the £1500, with interest from the date of the advance, by a mortgage of the *Selhurst Park* estate. The Plaintiffs alleged that this mortgage was fraudulent and void as against them, under circumstances which will be stated presently.

On the 16th of August, 1871, *Joseph Turnley* executed a fourth mortgage of the *Selhurst Park* estate to *Harriet Pellowe* (another step-daughter), to secure the payment of £3500 and interest.

On the 22nd of February, 1872, *Joseph Turnley* executed a fifth mortgage of the *Selhurst Park* estate to the Plaintiffs, to secure the payment of £5500 and interest. This mortgage comprised also a plot of land near the *Norwood Junction Station*, of which *Joseph Turnley* was then seised in fee free from incumbrances. *Harriet Pellowe* joined in this mortgage for the purpose of postponing her charge of £3500 on the *Selhurst Park* estate to the charge created in favour of the Plaintiffs. The mortgage contained a power of sale. The Plaintiffs were the trustees of the settlement executed on the marriage of *Joseph Turnley's* daughter, Mrs. *Luscombe*, and they had then recently recovered judgment against him in an action in the Court of Exchequer upon a covenant by him in the marriage settlement. The sum of £5500 was the amount which remained due to them under the judgment. When the Plaintiffs took their mortgage they had no notice of the mortgage of the 15th of August, 1871, to *Diana Pellowe*, though they had notice of the mortgages to the *Guardian Company* and the *Reliance Company*.

On the 21st of March, 1872, *Joseph Turnley* executed a memo-

C. A. 1879

CRACKNALL v. JANSON.

randum in writing, charging the *Selhurst Park* estate with the payment of £376 13*s.* 2*d.*, and interest thereon, to *R. C. Driver.*

On the 3rd of May, 1872, *Joseph Turnley* executed an agreement in writing charging the *Selhurst Park* estate with the payment of £250 and interest to Messrs. *Janson, Cobb,* and *Pearson,* and on the 9th of August, 1872, *Harriet Pellowe* executed a deed postponing her charge of £3500 to the charge in favour of *Janson, Cobb,* and *Pearson.*

On the 12th of August, 1872, *Joseph Turnley* executed another mortgage of the *Selhurst Park* estate to *Joseph Oliver,* to secure the payment of £4500 and interest.

On the 24th of April, 1873, the trustees of the *Guardian Company* transferred their mortgage and assigned the moneys then remaining due thereon to *Tuffnell,* who was the then surviving trustee for the *Reliance Company.*

By their statement of claim the Plaintiffs alleged that at the date of the mortgage of the 15th of August, 1871, *Joseph Turnley* was not indebted to *Diana Pellowe* in the sum of £1500, or in any other sum, nor was any money then or ever advanced by her to him on the security of the mortgaged property, and that the deed was executed by *Turnley* solely with a view to its being used by him at some future time for the purpose of defeating and delaying his creditors.

In the opinion of the Court, however, the evidence at the trial proved that the circumstances under which the mortgage was executed were as follows: On the 1st of April, 1864, a Mr. *William Johnson,* who was an intimate friend of *Joseph Turnley* and his family, and a man of large fortune, made *Diana Pellowe* a present of £1500. This sum was soon afterwards invested in the purchase of a sum of consols in the joint names of *Diana Pellowe* and a Mr. *Parker,* who was a cousin of hers. In May, 1864, the consols were sold, and the proceeds of the sale, which amounted to nearly £1500, were lent by *Diana Pellowe* to *Joseph Turnley.* But there was no agreement at the time of the advance that he should give her security for the repayment of the money, and she never subsequently pressed him to do so. When he had executed the mortgage he handed it to his wife, the mother of *Diana Pellowe,* and she retained it in her possession. Its execution was not com-

municated to *Diana Pellowe*, and, so far as appeared from the evidence, she did not know of the existence of the mortgage before the 28th of February, 1874.

On the 12th of February, 1874, *Joseph Turnley* filed a liquidation petition. In the statement of his affairs presented to the first meeting of his creditors under this petition he inserted the name of *Harriet Pellowe* in the list of his secured creditors, stating that she held a fourth mortgage upon the *Selhurst Park* estate, but he inserted the name of *Diana Pellowe* in the list of unsecured creditors. On the 28th of February, 1874, however, a proof was carried in on behalf of *Diana Pellowe* for £1687 10*s.*, which she alleged to be due to her, and her affidavit stated that she held as security a mortgage, subject to other mortgages, on the *Selhurst Park* estate, which security she was willing to give up to the trustee to be appointed under the proceedings. The proceedings under this petition became abortive, inasmuch as a resolution that the debtor's affairs should be liquidated by arrangement, which was proposed at the first meeting of the creditors on the 2nd of March, 1874, was not carried by the proper majority. On the 5th of March, 1874, *Joseph Turnley* filed a second liquidation petition, and under this petition his creditors duly resolved upon a liquidation by arrangement, and appointed *J. F. Lovering* trustee. Under this petition also *Harriet Pellowe* was entered in the list of secured creditors, and *Diana Pellowe* in the list of unsecured creditors. *Harriet Pellowe* carried in a proof for £3380, the sum which she alleged to be due to her upon her security, and she valued her security at £100, and claimed to prove on the debtor's estate for £3280. *Diana Pellowe* carried in a proof for £2243, the sum which she alleged to be then due to her for principal and interest, and her affidavit stated that she held as security a mortgage, subject to other mortgages, on the *Selhurst Park* estate, which security she was willing to give up to the trustee.

The Plaintiffs did not prove under either of the liquidation proceedings. They alleged that they never heard of the mortgage of the 15th of August, 1871, to *Diana Pellowe* until the spring of the year 1876, when they were about to commence this action.

In June, 1876, the Plaintiffs, in exercise of their power of sale, sold the *Selhurst Park* estate for £40,000, and on the 31st of

C. A. 1879 CRACKNALL v. JANSON.

October, 1876, the property was conveyed to the purchasers by a deed to which *Tuffnell*, the Plaintiffs, and the purchasers were parties. At the time when this deed was executed there was due to the *Reliance Company* (for whom *Tuffnell* was trustee) upon the security of the *Selhurst Park* estate, the sum of £35,817 13*s*, 4*d*. There was also due to the same company the sum of £273 4*s*. 5*d*., upon the security of an equitable deposit of a policy of assurance on the life of *Joseph Turnley*, and two mortgage deeds, dated respectively the 20th of September, 1866, and the 22nd of September, 1866, which three documents *Turnley* had in March, 1870, deposited with *Tuffnell* and *James* as trustees for the *Reliance Company*. *Tuffnell* claimed the right to consolidate the mortgage on the *Selhurst Park* estate with the equitable deposit of March, 1870, and declined to execute the conveyance of the 31st of October, 1876, unless the £273 4*s*. 5*d*., as well as the £35,817 13*s*. 4*d*., was paid to him out of the purchase-money. This was accordingly done, the whole sum paid to *Tuffnell* on behalf of the *Reliance Company* thus amounting to £36,090 17*s*. 9*d*. The documents comprised in the equitable deposit of March, 1870, were then delivered by *Tuffnell* to the Plaintiffs. Out of the residue of the purchase-money the sum of £2250 was invested in joint names to await the determination of the validity as against the Plaintiffs of the mortgage to *Diana Pellowe*, and the remainder of the purchase-money was paid to the Plaintiffs. *Lovering*, as trustee of *Turnley*, claimed to be entitled, by virtue of *Diana Pellowe's* abandonment of her mortgage in his favour, to stand in her place in respect of the mortgage, which he asserted to be a valid mortgage, and entitled to priority over that of the Plaintiffs. The Plaintiffs alleged that that mortgage was fraudulent and void as against them under the statute 27 Eliz. c. 4. They also alleged that, even if it was originally a valid mortgage as against them, and entitled to priority over their mortgage, the effect of the abandonment of it by *Diana Pellowe* in the liquidation proceedings was to merge and extinguish it in the equity of redemption of the mortgaged property for the benefit of the Plaintiffs and the subsequent incumbrancers. To determine this latter point a special case for the opinion of the Court was stated, under the Rules of Court, 1875, Order XXXIV., rule 1, upon which Vice-

Chancellor *Hall* decided that, by reason of *Diana Pellowe's* proof, the benefit of her mortgage passed to the trustee, and was kept alive for the benefit of the general creditors, retaining the priority to which, but for such proof, it was entitled over the Plaintiffs mortgage (*vide Cracknall* v. *Janson* (1)).

The Plaintiffs claimed to stand in the place of *Tuffnell* with regard to the right of consolidation which he had exercised, and to be entitled to retain the documents comprised in the equitable charge of March, 1870, until they had been paid, not only the £273 4*s.* 5*d.*, which had been paid to *Tuffnell* out of the purchase-money of the *Selhurst Park* estate, but the whole balance remaining due to them in respect of their mortgage of the 22nd of February, 1872, and, in addition to claiming a declaration that the mortgage to *Diana Pellowe* was fraudulent and void as against them, they asked that an account might be taken and payment directed of what was due to them for principal, interest, and costs on the security of the plot of land near *Norwood Junction Station* comprised in the mortgage of the 22nd of February, 1872, which still remained unsold, and of the documents comprised in the equitable deposit of March, 1870, and that in default of payment the Defendants might be foreclosed.

The Defendants to the action were Messrs. *Janson, Cobb,* and *Pearson; Harriet Pellowe; R. C. Driver; Joseph Oliver;* and *Lovering.*

Lovering delivered a statement of defence and counter-claim, by which he insisted on the validity of *Diana Pellowe's* mortgage, and asked for an account of what was due in respect of that mortgage, and for foreclosure of the Plaintiffs and the other Defendants in default of payment.

The evidence was taken by affidavit.

One of the affidavits filed on behalf of the Plaintiffs contained some passages imputing immoral conduct to a person who was not a party to the action.

The action came on for trial before Mr. Justice *Fry* on the 26th of June, 1878.

Cookson, Q.C., and *Creed,* for the Plaintiffs:—

The mortgage to *Diana Pellowe* is void as against us under the

(1) 6 Ch. D. 735.

C. A. 1879 CRACKNALL v. JANSON.

statute 27 Eliz. c. 4. It may even be said that it was never delivered as a deed: *Watkins* v. *Nash* (1). But, if it was, there is no proof of any agreement by *Turnley* when the money was lent to him to give security for it, or of any subsequent pressure on the part of *Diana Pellowe* for payment or security. Forbearance to enforce payment of an existing debt has been held in some cases to be consideration for an agreement to give security: *Oldershaw* v. *King* (2); *Alliance Bank* v. *Broom* (3); but that is when the lender is pressing for payment. The recital of the agreement contained in the mortgage is no estoppel as against us. There is nothing to shew that *Diana Pellowe* knew of the execution of the mortgage before the 28th of February, 1874, when she proved in the first liquidation, and that was long after the date of our mortgage: *Wallwyn* v. *Coutts* (4); *Garrard* v. *Lord Lauderdale* (5).

[FRY, J.:—The question is, whether the mortgage to *Diana Pellowe* was a voluntary deed; whether, in the absence of any proof of agreement or pressure, it is void as against you?]

The statute makes it void under such circumstances.

The doctrine of consolidation of mortgages applies: *Beevor* v. *Luck* (6). We are entitled to stand in the same position as *Tuffnell* did, or even in a better position. There being no surplus of the purchase-money, it was in effect all our money after paying his first mortgage, and his equitable mortgage was in effect paid off out of our money. We were then entitled to call for the documents which had been deposited under the equitable mortgage, and being thus in the position of equitable mortgagees we had a right to hold the documents until both our debts should have been paid off.

North, Q.C., and *Rigby*, for *Lovering*:—

The mortgage to *Diana Pellowe* must be shewn to have been voluntary: *Doe* v. *Manning* (7); otherwise it is not made void by the statute. Non-communication of the deed to the mortgagee could not affect its validity: *Fletcher* v. *Fletcher* (8); *In re Way's*

(1) Law Rep. 20 Eq. 262.
(2) 2 H. & N. 517.
(3) 2 Dr. & Sm. 289.
(4) 3 Mer. 707.
(5) 2 Russ. & My. 451.
(6) Law Rep. 4 Eq. 537.
(7) 9 East, 59.
(8) 4 Hare, 67.

Trusts (1). In *Exton* v. *Scott* (2), a mortgage executed by the mortgagor voluntarily and without any communication to the mortgagee, and retained in the possession of the mortgagor until his death, was held to be good as against his creditors.

The recital in the deed of the agreement to give the mortgage operates as an estoppel against the Plaintiffs, who claim through the same mortgagor.

The doctrine of consolidation does not apply. The *Reliance Company* were paid off, not by the Plaintiffs, but out of the purchase-money, to which the Plaintiffs were entitled only after the claim of the *Reliance* had been satisfied. The Plaintiffs had no right to call for the documents deposited under the equitable mortgage.

In any event the Plaintiffs ought to pay the costs as between solicitor and client of the scandalous and irrelevant matter contained in one of the affidavits: *Christie* v. *Christie* (3); *Forester* v. *Read* (4).

Cookson, in reply:—

Exton v. *Scott* was a case under the statute 13 Eliz. c. 5, and it was not shewn that the mortgagor was insolvent when he executed the mortgage. The recital of an agreement to give a mortgage cannot estop us, because we claim under a better title through the statute. The law as to voluntary deeds is shewn by *Spirett* v. *Willows* (5); *Freeman* v. *Pope* (6). Applications to strike out scandalous matter, or to compel a party to pay the costs of it, have always been made by the injured party. The Court will not act on the application of a person who is not injured: *Ex parte Simpson* (7); *Erskine* v. *Garthshore* (8); *Ex parte Le Heup* (9); *Coffin* v. *Cooper* (10); *Atwool* v. *Ferrier* (11); *Forester* v. *Read*; *Christie* v. *Christie*. Moreover, there is nothing scandalous in the affidavit complained of, for the alleged scandalous matter is relevant to one of the issues to be tried.

(1) 2 D. J. & S. 365. 10 Jur N S 1107
(2) 6 Sim. 31.
(3) Law Rep. 8 Ch. 499.
(4) Ibid. 6 Ch. 40.
(5) 3 D. J. & S. 293. 11 Jur N S 70
(6) Law Rep. 5 Ch. 538.
(7) 15 Ves. 476.
(8) 18 Ves. 114.
(9) Ibid. 221.
(10) 6 Ves. 514.
(11) 14 W. R. 1014.

C. A. 1879 CRACKNALL v. JANSON.

FRY, J., after stating the facts, continued:—

It appears to me upon the evidence to be reasonably clear that the money was in the first place lent by *Diana Pellowe* to Mr. *Turnley* without any agreement for security, and further, that there was no demand afterwards made by her for payment or security. It appears equally clear that Mr. *Turnley* executed and delivered the mortgage to her with all the necessary formalities, that it was delivered as a deed and not as an escrow, and further, that *Diana Pellowe* had no knowledge for two years afterwards of the execution of the deed, or of her having any other rights than those which resulted from the mere fact of the loan.

If there had been pressure by her for the security, or agreement, in fact, to give it, that would, in my opinion, have been a good consideration for it, because I think the authorities have established that in both those cases the law imports an agreement on the part of the lender to forbear for a certain undefined period of time. But in the present case I find neither pressure nor agreement in fact. If before the 22nd of February, 1872, the date of the Plaintiffs' mortgage, *Diana Pellowe* had known of and had adopted the deed of the 15th of August, 1871, I should probably have held that an agreement had been in fact constituted between her and Mr. *Turnley* in respect of the execution of the security. But, inasmuch as it appears that she never knew of, and could not therefore have adopted or ratified or acquiesced in, the deed of the 15th of August, 1871, until two years or more after the execution of the Plaintiffs' mortgage, it appears to me impossible to say that that subsequent ratification by her could constitute a valid consideration two years previously. For I must try the question as on the date when the Plaintiffs' title was derived from Mr. *Turnley*. It has been, however, urged that the effect of the deed of the 15th of August, 1871, containing, as it does, a recital of an agreement to give a mortgage, is to estop Mr. *Turnley* and the Plaintiffs who claim through him from denying that there was such an agreement. As regards Mr. *Turnley* and all those who claim simply under him, I will not for a moment say that such an estoppel might not work. But the Plaintiffs' title is derived under the statute 27 Eliz. c. 4, and the questions arising under that statute must, as it appears to me, be tried

independently of any estoppel between the defrauding vendor and the persons who claim through him. The statute itself gives to a purchaser for valuable consideration from the person who has executed a voluntary conveyance a title higher and better than that which he himself possessed. The doctrine of estoppel, which might prevail as between the voluntary grantor and the person who derives title under the voluntary conveyance, cannot bind those who claim from the former by a subsequent purchase for value, and consequently derive title under the statute itself.

I come, therefore, to the conclusion that the mortgage of the 15th of August, 1871, must be declared fraudulent and void as against the Plaintiffs.

There is one other observation which I ought to make before parting with this part of the case, viz., that *Exton* v. *Scott* (1) appears to me not to be an authority governing the present case, for the reason pointed out by Mr. *Cookson*. There the grantor was not insolvent when he executed the deed, and he remained in a state of solvency for twelve years afterwards. The Vice-Chancellor, therefore, held that the statute 13 Eliz. c. 5, did not apply.

Then arises this further question. The Plaintiffs say, "Inasmuch as £273, which was the amount claimed by Mr. *Tuffnell* on the mortgage of March, 1870, has been taken out of the money produced by the sale of the thirty-two acres in priority to us, we are entitled to have that sum repaid to us out of the balance if it exists." It appears to me that that contention cannot prevail, and for this simple reason, that the £273 was never paid by the Plaintiffs at all. The whole of the Plaintiffs' argument on this branch of the case rests upon an allegation of their right to consolidate their mortgage on the thirty-two acres and the plot of land near the *Norwood Station*, with the equitable mortgage of March, 1870.

Now, the doctrine of consolidation arises where one person is the owner of two mortgages. But here the Plaintiffs are not the owners of two mortgages; they are not the owners of the mortgage of March, 1870. They have never paid it off, they have never taken an assignment of it; but, on the contrary, what has happened is this—the mortgage of March, 1870, has been satisfied

(1) 6 Sim. 31.

C. A. 1879 CRACKNALL v. JANSON. Fry, J.

and discharged by a payment out of the proceeds of the sale of the thirty-two acres upon which, by virtue of the doctrine of consolidation, it became a charge.

The Plaintiffs have made two further claims. In the first place they say, with regard to the plot near the station, that they are entitled to hold it as a security, not only for the amount which shall remain due upon the mortgage of 1872, after appropriating towards it the balance of the proceeds of sale of the thirty-two acres, but also for the amount due upon the mortgage of March, 1870. The answer is, they cannot have that amount out of anything. They certainly cannot tack it to their security on the plot near the station. The converse case is raised in respect of the security of March, 1870. The Plaintiffs seek to tack to the £273 which is assumed to be due on that security the whole amount due upon the mortgage of February, 1872. I can allow no such right, for the simple reason that the Plaintiffs are not assigns of the mortgage of March, 1870. The simple fact that the mortgage of March, 1870, instead of being transferred to the Plaintiffs, has been satisfied, answers negatively all the arguments of the Plaintiffs with regard to the proceeds of sale of the thirty-two acres, the plot of land near the station, and the security of March, 1870.

Those are the two material questions which have been presented to me for determination. But some minor points have arisen. During the argument I observed upon the undue prolixity of the Plaintiffs' affidavits, and I have listened to them with very great regret. With regard to all of them I shall act upon rule 18 of Order VI. of the Additional Rules of Court of August, 1875, and give a direction to the Taxing Master to look into the affidavits and disallow the costs of so much of them as shall appear to be of unnecessary length.

Then there are some parts of one of the Plaintiffs' affidavits to which my attention has been called as being scandalous. I greatly regret that much of the matter which appears in one of the paragraphs, which has been specially adverted to, has been placed upon the records of the Court. But at the same time I cannot say that the greater part of it is clearly irrelevant to one of the issues which the Plaintiffs have raised, namely, the absence of any consideration originally passing from *Diana Pellowe* to Mr. *Turnley*.

It is quite true that on that issue the Plaintiffs have failed, or rather it has not been presented to me by their counsel as a serious one, because it is evident from the reading of the evidence that it could not be maintained. But nevertheless it was an issue raised by the pleadings, and the greater portion of the paragraph in question, being relevant to that issue, cannot be considered scandalous. It appears to me that the portions of it which I might call scandalous are so small that it would be very undesirable to put the parties to the inconvenience and expense of picking them out and ascertaining their extent. But I must make this observation. It has been urged that the Court cannot strike out scandalous matter or order the costs of it to be paid, when its attention has not been called to it by some one who is a party to the action, and who is personally affected by the scandalous matter. I do not think that the arm of the Court is so much shortened as that. I think that when the attention of the Court is drawn to scandalous matter, be it by a party to the action who is not injured, or by the proper motion of the Court, or by a stranger, the arm of the Court is long enough to direct that the person who has defiled its records by scandalous matter shall pay the costs of it. Therefore, although I do not act upon the suggestion that I should allow the costs as between solicitor and client of any part of this matter as being scandalous, I desire to state clearly that I am not proceeding upon the argument which has been addressed to me on behalf of the Plaintiffs. I think, however, that as the Plaintiffs have raised the issue that no consideration ever passed from *Diana Pellowe* to Mr. *Turnley*, and have for the purpose of maintaining that untenable proposition thought fit to put scandalous matter upon the records of the Court, I can and ought to order that the Plaintiffs pay the costs of so much of the evidence as has been directed to the question whether there was an actual advance of money by *Diana Pellowe* to Mr. *Turnley*, and I order that accordingly.

North:—Your Lordship will direct the Plaintiffs to deliver up to the trustee the documents comprised in the equitable mortgage of March, 1870.

FRY, J.:—I do not see how I can do that. You do not ask for it by your counter-claim.

C. A. 1879 — CRACKNALL v. JANSON.

North:—The Plaintiffs claim a charge upon the documents. The Court is dealing with the priorities, and all the parties are entitled to have their rights declared.

FRY, J.:—I think I can make it a condition. I declare that the Plaintiffs are not entitled to any right in respect of the equitable mortgage of March, 1870, and I direct that the documents comprised in it are to be delivered up to the trustee.

The order made was in substance as follows:—

Declare that the Plaintiffs as mortgagees under the indenture of 22nd February, 1872, are purchasers within the meaning of 27 Eliz. c. 4, and that the mortgage of 15th August, 1871, is void as against the Plaintiffs.

Declare that as between the Plaintiffs and *Lovering* the property secondly described in the indenture of 22nd February, 1872 (the station land) is first applicable towards payment of what is due to the Plaintiffs.

Order costs of the Plaintiffs and *Lovering* of the examination of *Turnley de bene esse* to be costs in the action.

The Court finding on the issue raised by the Plaintiffs that on 15th August, 1871, *Turnley* was indebted to *Diana Pellowe* in the sum of £1500, and that the affidavits filed on behalf of the Plaintiffs, or some of them, are improper or of unnecessary length, refer it to Taxing Master to tax *Lovering's* costs of the evidence in relation to that issue, and to look into the affidavits and disallow the costs of such affidavits or such parts thereof as he shall find to be improper, unnecessary, or of unnecessary length, and to ascertain the costs occasioned to *Lovering* by the affidavits or parts of affidavits so disallowed, and order the Plaintiffs to pay *Lovering* his costs of the evidence relating to the said issue and the costs occasioned to him by the parts of the Plaintiffs' evidence so disallowed.

1. Take an account of what is due to Plaintiffs for principal, interest, and costs, having regard to the directions hereinbefore contained.

2. Take an account of all money to be received by Plaintiffs or either of them, &c., arising from the proceeds of the sale of the property secondly described in the indenture of 22nd February, 1872, or from the rents and profits thereof, and let what is coming from the Plaintiffs on this account be set off against what is found due to them on the first account, and let the balance be certified.

Declare that the Plaintiffs are to be at liberty to apply the £3909 2*s.* 3*d.* and accrued interest, the residue of the purchase-money of £40,000, in reduction, so far as it will extend, of the balance which shall be certified to be due to them for principal, interest, and costs after such deduction as aforesaid.

Declare that the Plaintiffs are not entitled to any charge on the deposited securities, and order them to deliver up the policy of assurance and the other deposited securities to *Lovering*, and to pay to him any moneys received by them in respect of such securities or any of them.

Liberty to apply.

The Plaintiffs gave notice of appeal, asking that the last declaration and the consequential order might be discharged, and that

the Plaintiffs might be declared entitled to hold the deposited securities as well as the remaining premises comprised in the mortgage of the 22nd of February, 1872, as a security for the payment of what was due to the Plaintiffs on the mortgage of the 22nd of February, 1872, including what had been paid to *Tuffnell* in respect of the loan on the deposited securities, and that all necessary consequential alterations might be made in the order under appeal. And, further, that the order so far as it found on the issue raised by the Plaintiffs that on the 15th of August, 1871, *Turnley* was indebted to *Diana Pellowe* in £1500, and so far as it directed taxation of *Lovering's* costs of the evidence on that issue and ordered the Plaintiffs to pay them, might be discharged or varied.

Lovering, upon being served with this notice, gave notice that he intended on the hearing of the appeal to contend that the decision of the Court below should be varied by discharging that part of Mr. Justice *Fry's* order which declared that the Plaintiffs were purchasers within 27 Eliz. c. 4, and that the mortgage of the 15th of April, 1871, was void against them, and that in lieu thereof it might be declared that *Lovering* was entitled in respect of that security to rank as an incumbrancer on the property in priority to the Plaintiffs and the other Defendants.

The appeal came on for hearing on the 3rd of March, 1879.

C. A.

Cookson, Q.C., and *Creed*, for the Plaintiffs, in support of the appeal:—

The £273 was paid to *Tuffnell* out of money which but for his claim would have come to us, and we were forced to pay it, for *Tuffnell's* right to consolidate his securities was indisputable, yet the decree does not even give us the benefit of that payment.

[Counsel for the Respondent here admitted that this was a slip, and stated their opinion to be that Mr. Justice *Fry* had not intended to decide that.]

But we put our case higher, and say that we are entitled to consolidate and to hold the deposited securities for our whole debt.

[JESSEL, M.R.:—Your difficulty is that you did not pay off *Tuffnell*. He was not bound to consolidate his mortgages.]

C. A. 1879 CRACKNALL v. JANSON.

Suppose *Tuffnell* had had two securities for one debt, we having only a security on one of the properties, we should have had a right to say that as between us and persons claiming the equity of redemption *Tuffnell's* debt must be borne primarily by the property on which we had no security. Then take the case of his having two securities and two debts, which is the actual case. We are entitled to say that, as he has claimed to consolidate, the estates must be looked upon as one security for the aggregate debt, and that the property on which we have no security must be first applied. We say that when consolidated the mortgages cannot for any purposes be severed. We, in fact, paid off *Tuffnell*, for he was paid out of money arising under the exercise of our power of sale, and which but for his claim would have come to us; we therefore are to be treated as equitable assigns of the deposit security, and we are entitled to consolidate that security with our subsisting mortgage on the station plot. The admission by the other side that we are entitled to hold the deposited security for the £273 in fact admits our whole case. If we are entitled to hold them for that debt, we can consolidate and hold them for all that is due to us.

North, Q.C., and *Rigby*, for *Lovering*:—

The money paid to *Tuffnell* was not the second mortgagee's own money.

[JESSEL, M.R.:—Substantially it was; it was money which would have been paid to the second mortgagee if the first mortgagee had not claimed to consolidate, and he could only consolidate on the terms of handing over all his securities when he was paid off.]

When the first mortgagee was paid off his mortgage was satisfied.

[JESSEL, M.R.:—That is not so unless the money is paid by the mortgagor.]

There is evidence to shew that nothing was in fact due on the deposit security at the time of the sale.

[JESSEL, M.R.:—We cannot take the account in Court.

JAMES, L.J.:—There appears to me to be good *primâ facie* evidence that the £273 was due, but you are entitled to an inquiry at your own risk if you ask for it.]

JESSEL, M.R.:—

The case made by the Plaintiffs is this. There was a mortgage by *Turnley* of the freehold land called the *Selhurst Park* estate for a large sum of money to Mr. *Tuffnell*, as trustee for the *Reliance Assurance Company*, and there was another distinct mortgage to him in the same capacity for a comparatively small sum from the same mortgagor, which I will call a mortgage of securities. That being so, according to the well established rule in Equity, he was entitled to consolidate those mortgages against the mortgagor and those claiming under him.

The same mortgagor made a second mortgage to the Plaintiffs of the *Selhurst Park* estate, and included in the security some land near a station, and which has been called the station land, which was not subject to any prior mortgage. So that the Plaintiffs were in the position of second mortgagees of one of the properties mortgaged to Mr. *Tuffnell* and first mortgagees of the station land. Subject to that, for the sake of simplicity we will take it that the mortgagor remained owner, and that on his bankruptcy that ownership passed to the Defendant Mr. *Lovering*, his trustee in bankruptcy. Then the Plaintiffs, as second mortgagees of the *Selhurst Park* estate, put it up for sale under their power of sale, and converted it into money. The money produced by the sale was not sufficient to pay off the first mortgage on the *Selhurst Park* estate, and the Plaintiffs' mortgage. When the Plaintiffs applied to Mr. *Tuffnell* to join in conveying the legal estate in the *Selhurst Park* estate to the purchasers, Mr. *Tuffnell* said, "No, there is due to me on the mortgage of the securities a sum of £273. I will not convey the legal estate in the *Selhurst Park* property unless you pay me that sum in addition to the sum due on the *Selhurst* property;" that is, he availed himself of the right to consolidate. It seems to me, assuming that there was any such sum due on the mortgage of securities, that he was entitled to claim payment of both sums before conveying. The Plaintiffs accordingly paid him both sums out of the purchase-money. Now, the money thus applied in paying the £273 belonged to the Plaintiffs absolutely, because if there had been no such claim on the part of Mr. *Tuffnell*, the whole balance of the purchase-money after paying off the first mortgage on the *Selhurst Park* estate,

C. A. 1879 CRACKNALL v. JANSON.

being insufficient to pay the second mortgage belonging to the Plaintiffs, would have belonged to them. There was, therefore, a payment by the Plaintiffs out of their own money to Mr. *Tuffnell* of this sum of £273.

What then were the rights of the Plaintiffs as between them and the trustees in bankruptcy of the mortgagor? As they had paid under compulsion of law this sum of £273 to Mr. *Tuffnell*, they were entitled to stand in his place as against the mortgage of the securities—in other words, they were what we call equitable transferees, even without a transfer being executed. As between them and the trustee of the bankrupt, they were entitled as equitable transferees to the amount of mortgage money due on the security mortgage, and to the benefit of that security. I may say that the transaction was properly carried out according to law, because, although no transfer of the mortgage of securities was executed, the securities were delivered over to the Plaintiffs.

At that time there was due to the Plaintiffs on their first mortgage of the station land a considerable sum, being the balance which the proceeds of the sale were insufficient to pay. They therefore were in this position. They were equitable mortgagees of the property comprised in the security mortgage for £273, and they were legal mortgagees of the station land for the balance due to them on their own mortgage. They were consequently in the position of having two independent mortgages on two independent properties, mortgaged by the same mortgagor. That being so, the rule of consolidation would apply, and they would be entitled to say to their mortgagor, "You cannot redeem one of the properties without redeeming both." They consequently were entitled to consolidate as against him, and to require payment of all that was due to him out of the two properties comprised in the two securities. It seems to me that this is not only no extension of the rule of equity as to consolidation of mortgages, but is the most simple application of it, and that this contention ought to have been allowed by the learned Judge in the Court below and directions given accordingly.

Of course, if the Defendant disputes the fact that any sum was due to Mr. *Tuffnell* on the security mortgage, there must be an inquiry as to whether such sum as he alleges, or any sum, was due,

because if nothing was due to Mr. *Tuffnell* the right to consolidate would not arise. If then Mr. *Lovering* requests it, as I understand he does, he can take an inquiry at his own risk as to whether there was anything due on the security mortgage to Mr. *Tuffnell* at the time he was paid off; but if, on the result of the inquiry, it appears that anything was due, or if he does not take the inquiry, then there must be a direction to consolidate.

JAMES, L.J.:—

I am of the same opinion. I do not think it is necessary for me to add anything to what the Master of the Rolls has said.

BRAMWELL, L.J.:—

I am also of the same opinion.

Cookson, Q.C.:—

The next question is as to the costs of the issue whether *Diana Pellowe* made an advance to *Tuffnell*.

[JAMES, L.J.:—Is not that a mere appeal as to costs?]

No; the Judge below gave costs against us solely on the ground that we failed on the issue of fact, whereas we say that we had established our case.

JESSEL, M.R.:—

The most convenient course will be that the cross appeal should be opened, for *Lovering* claims under a mortgage, and it lies on him to shew that money was advanced and a good security given for it.

Rigby, for *Lovering*:—

The evidence satisfactorily shews that *Diana Pellowe* actually advanced the £1500 to *Turnley*, and he gave a mortgage for it, which, though not communicated to her, was still good: *Exton* v. *Scott* (1); and, having been made for valuable consideration, it is not affected by 27 Eliz. c. 4.

(1) 6 Sim. 31.

C. A. 1879 — CRACKNALL v. JANSON.

At the conclusion of *Rigby's* argument the Court stated that they should not require to hear the Plaintiff's counsel on the question whether the mortgage was invalid as against the Plaintiff under 27 Eliz. c. 4, but intimated a strong opinion that the decision as to the costs of the issue as to whether the £1500 had been advanced could not be interfered with.

Cookson, for the Plaintiff:—

I will not, then, press that point; but I contend that on another ground the order as to costs ought to be varied. The Judge has made us pay the costs of the issue on which we failed, but has only allowed us, where we succeeded, to add our costs to our already insufficient security. The result is that, though we have succeeded in our main contention, we pay out of our own pockets all our own costs and part of *Lovering's* costs. The Respondent having given a cross notice, this point, though not raised on our notice of appeal, is open to us as under the old practice, where the whole decree was open to the Respondent. There is nothing in the *Judicature Act* to do away with that rule. We ought to have our costs of the suit, except the costs of the issue on which we fail, and *Lovering's* costs of that issue should be set off.

Rigby, contrà:—

I am not in the position of an Appellant. *Lovering* is only a Respondent who in compliance with Order LVIII., rule 6, has stated in what respects he contends that the order ought to be varied.

[JESSEL, M.R.:—I think you must be treated as an Appellant; and even without a cross appeal the Court, under Order LVIII., rule 5, can do justice.]

JESSEL, M.R.:—

The first question which we have to decide is whether the learned Judge of the Court below came to a correct conclusion as to the actual advance of the sum of £1500 by the step-daughter to *Joseph Turnley*. I should be very reluctant to differ from the decision of the Judge of the Court below on a question of fact, and indeed I should not differ from him unless I was clearly convinced that he had arrived at an erroneous conclusion. The

verdict is in favour of the Respondent, and it is not for the Court of Appeal lightly to disturb a verdict on a question of fact; but I must say that, looking at the evidence, I think the balance of evidence was strongly in favour of the conclusion at which the learned Judge has arrived. [His Lordship then referred to the evidence, and continued:—]

On this point, therefore, I think the decision of the learned Judge of the Court below should be affirmed.

We now come to the next point, which is the subject of a cross appeal. The Appellant says that the mortgage security given by Mr. *Turnley* in favour of his step-daughter *Diana Pellowe* is a valid mortgage security. The learned Judge has decided that it was avoided by the provisions of the statute of the 27 Eliz. c. 4, and the question which is raised for our consideration is whether he was right in so doing.

The facts are tolerably plain. The Plaintiffs had brought an action for a very large sum of money in January, 1871, against Mr. *Joseph Turnley*, a sum of money which he was unable to pay. They had asked for security, and had not obtained it. According to the decision on the main issue Mr. *Turnley* had, in May, 1864, received a loan of money from his step-daughter, for which he had given no security, and as to which there is no evidence that he had paid any interest, or (with the exception of a paper given to his wife, the effect of which it is not very easy to state) had given any acknowledgment for it. After a lapse of more than six years, and on the 13th of August, 1871, whilst this action against him is pending, Mr. *Turnley* makes a secret deed of mortgage. He draws it up himself, does not communicate it to his step-daughter *Diana;* it recites an agreement for a mortgage for £1500, and, subject to prior mortgages, conveys the *Selhurst Park* estate to the step-daughter by way of mortgage for securing the repayment of £1500 and interest. That deed he kept in his own possession, subject to this, that he says he gave it to his wife to take care of, and the wife did not communicate it to the step-daughter, nor was any communication made to her whatever. Legally it remained in the possession and custody of Mr. *Joseph Turnley.*

The action having gone on to judgment, Mr. *Turnley* gives a security to the present Plaintiffs, who were the Plaintiffs in the

C. A. 1879

CRACKNALL v. JANSON.

Jessel, M.R.

action, on this very estate, by way of second mortgage, for the balance of the sum due to them on their judgment, and in doing so he suppresses and conceals from them the existence of this mortgage to *Diana*, and covenants against incumbrances, except the incumbrances therein mentioned, which were the incumbrances prior to the date of the mortgage in question. The Plaintiffs, being purchasers for value, assert that this is exactly within the terms of the statute 27 Eliz. c. 4. Let us see what the statute says. After stating that great loss is incurred "by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses," and so on, "which said gifts, grants, charges, estates, uses, and conveyances were or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous of purpose and intent to deceive such as shall have purchased or shall purchase the same, or else by the secret intent of the parties the same to be to their own proper use and at their free disposition, coloured nevertheless by a feigned countenance and shew of words and sentences as though the same were made *bonâ fide* for good causes and upon just and lawful consideration." Now, I have no doubt whatever that the action of Mr. *Turnley* in this case was exactly that described in the second part of the preamble. Though he made this mortgage to be used, if he thought it convenient, in favour of the step-daughter, it was his secret intent that the same should be at his free disposition, so that, if he did not wish to bring it forward, he could keep it secret and get an advance of money or forbearance by conveying the estate, either by way of mortgage or sale, to other parties. The whole of his acts point to this most conclusively, and I think they could not be explained on any other theory. The only other possible suggestion would be that he intended to make it so as to defraud the Plaintiffs; that is, he intended to defraud the Plaintiffs by allowing them to purchase an incumbered estate, and that would bring him within the first part of the recital, and would make it equally void. It appears to me that this is exactly the case contemplated by the statute, and that the learned Judge in the Court below was quite right in so deciding, and that we ought to affirm his decision.

The only other point which remains is the question of the costs.

The costs in the Court below have been given to the cross Appellant, the Respondent on the first appeal, so far as regards so much of the issue as related to the question whether the advance had been actually made by the step-daughter to Mr. *Turnley;* but the Plaintiffs complain that equal justice has not been meted out to them by giving them the costs of the issue on which they succeed, viz., the declaring the deed void as being contrary to the provisions of the statute to which I have referred, and it seems to me that that complaint is well founded. According to the ordinary rule of the costs following the result, the Plaintiffs, having succeeded in the main part of the issue—that is, in setting aside the deed, which is the real contention between the parties—ought to have their costs generally, except so far as they have been increased by the issue on which they have failed, and the costs of the issue on which they failed will be given to the parties who succeeded on that issue, and one set of costs will be set off against the other. The Plaintiffs having substantially succeeded, will have their whole costs of the appeal and the cross appeal.

JAMES, L.J.:—

I am of the same opinion; and I may add that I never saw a case more clearly within the words of the statute.

BRAMWELL, L.J.:—

I am also of the same opinion.

Solicitor for Plaintiffs: *H. White.*
Solicitor for Trustee: *J. W. Sykes.*

C. A.
1879
Feb. 13.
V.-C. M.
C. A.
Feb. 17.

WRIGHT *v.* REDGRAVE.

[1879 W. 50.]

Injunction—Restraining Sale by Sheriff—Interpleader Order—Judicature Act, 1873, *s.* 24, *sub-s.* 5.

Goods having been taken in execution under a *fi. fa.* against *W.*, the trustee of Mrs. *W.'s* settlement claimed them as separate estate of the wife. The sheriff thereupon took out an interpleader summons in the Common Pleas Division, upon which an order was made that upon the trustee paying £115 into Court within a limited time, the sheriff should withdraw, but in default of such payment being made, should sell, and pay the proceeds into Court, and that the parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into Court by the trustee within the time, and the sheriff advertised the goods for sale. Mrs. *W.* thereupon commenced an action in the Chancery Division to have the trusts of the settlement carried into execution, a new trustee appointed, and, in the meantime, for the appointment of a receiver. An injunction to restrain the sheriff from selling the goods or remaining in possession of them was granted by *Malins*, V.C.:—

Held, on appeal, that this order was a restraining by injunction a proceeding pending in the Common Pleas Division, and was inconsistent with the *Judicature Act*, 1873, s. 24, sub-s. 5, and must be discharged.

On the 11th of November, 1878, judgment for £104 6*s.* was obtained in the Common Pleas Division by *Redgrave* against *Herbert Wright*, on a bill of exchange of which *Redgrave* was the holder. On the 18th of November, 1878, *Redgrave* issued a *fi. fa.* On the 24th of December, 1878, the sheriff of *Middlesex*, under this writ, seized the furniture in *Wright's* house.

Wright had married his wife on the 21st of September, 1861, and previously to the marriage a memorandum was signed, by which *Wright* agreed to grant and assign to *John Tucker*, as trustee, all and every the household goods and furniture, plate, linen, china, books, pictures, wines, and spirits, fixtures, fittings, linen, and all and every other the goods, chattels, property, and effects then or thereafter upon the dwelling-house, 6, *Waterloo Street, Birmingham*, or other the premises where the husband and wife might reside. The trusts were for *Wright* till the marriage, and afterwards for Mrs. *Wright* for life for her separate use, with such ulterior trusts as therein mentioned.

Tucker having given the sheriff notice that he claimed the goods under the settlement, the sheriff, on the 27th of December, took out a summons under the *Interpleader Act*, calling upon *Redgrave* and *Tucker* to state the nature and particulars of their respective claims to the goods and chattels which had been seized. On the 10th of January, 1879, Master *Dodgson* made an order upon this summons that upon payment of £115 into Court by *Tucker* within fourteen days, or upon his giving security for payment of that amount, and upon payment to the sheriff of possession-money from the 30th of December, 1878, the sheriff should withdraw from possession; and that unless such payment should be made, or security given within the above time, the sheriff should proceed to sell the goods, and pay the proceeds into Court; and that the parties should proceed to the trial of an issue in the Common Pleas Division, in which *Tucker* should be Plaintiff and *Redgrave* Defendant; and that the question to be tried should be settled by the parties, and if they could not agree, then by the Master.

Tucker neither paid the money into Court nor gave security, and it was deposed to by *Wright* that he had informed *Wright* and wife that he had positively determined to have nothing further to do with the trusts of the settlement or with the interpleader proceedings, and required them to find some person at once to succeed him as trustee.

The time under the interpleader order having expired without the money having been paid into Court, or security given, the sheriff proceeded to advertise the goods for sale. Mrs. *Wright* thereupon, on the 1st of February, 1879, commenced an action in the Chancery Division by her next friend against *Redgrave*, *Tucker*, *Wright*, and the sheriff of *Middlesex*, claiming to have the agreement of the 21st of September, 1861, specifically performed, and the trusts thereof executed; a declaration that the property included in the agreement was thereby vested in *Tucker* in trust for her separate use and was not liable for her husband's engagements; the appointment of a new trustee in the place of *Tucker;* and the appointment of a receiver until a new trustee was appointed.

On the 1st of February, 1879, Mr. *Wright* served along with the writ a notice of motion for the 3rd of February, for an injunction to restrain *Redgrave* from taking any further proceedings under

C. A. 1879 WRIGHT v. REDGRAVE.

the *fi. fa.* so as to affect the settled furniture, and to restrain the sheriff from remaining in possession of the furniture or proceeding to sell it, or taking any further proceedings under the *fi. fa.*, or any other writ of execution against the premises subject to the settlement. On Monday, the 3rd of February, the motion was brought on, and was directed, on the application of the sheriff, to stand over till Thursday, the 6th, he undertaking not to sell in the meantime, and the Court gave leave to serve an amended notice of motion. The amended notice was that a new trustee might be appointed, and that until such new trustee was appointed, and a settlement executed, a proper person might be appointed receiver to receive the furniture and effects, and that they might remain in the custody of such receiver. On the 6th the motion was mentioned, and an interim order made that the sheriff should not sell till after the 13th of February. On the 12th of February a summons which had been taken out by *Wright* in the action to have the proceedings in the Common Pleas Division transferred to the Chancery Division was refused, with costs, by Mr. Justice *Field.*

It was in evidence that by an order dated the 15th of September, 1870, an execution creditor of the husband and the sheriff of *Warwick* had been restrained from interfering with the furniture comprised in the agreement, and that on the 14th of November, 1870, a similar order had been made against another execution creditor. The husband deposed that the goods now seized were the same goods as were in his house at the time when the agreement for a settlement was entered into.

The motion was heard before Vice-Chancellor *Malins* on the 13th of February, 1879.

Higgins, Q.C., and *G. A. Young*, in support of the motion:—

We do not press for an injunction in this case, but we ask for a receiver of the separate property of the wife. There is no question but that the agreement made on the marriage and in consideration of the marriage, that the husband would assign the household goods and furniture for the separate use of the wife, constitutes a valid settlement, and the wife has a right to come to this Court to protect her separate property against the debts of her husband.

The wife was not a party to the action in the Common Pleas Division, and the *Judicature Act*, which gives power to the Courts of the Common Law Division to decide questions of equity, does not therefore apply to this case. The judgment in the Common Pleas only affected the goods of the husband. These goods do not belong to the husband and we claim protection against their seizure by the sheriff. A receiver would protect such goods as belong to the wife from being sold.

Glasse, Q.C., and *G. Curtis Price*, for the Defendants:—

This Court cannot interfere with the hearing of an action in the Common Pleas Division. The 24th section, sub-sect. 5, of the *Judicature Act*, 1873, distinctly enacts that no cause pending in the High Court of Justice shall be restrained by injunction; but that every matter of equity on which an injunction might formerly have been obtained may be relied upon in the action. The effect of this motion is to restrain the execution of a judgment in the Common Pleas. This question of separate use might have been raised in that Court by the trustee of the settlement, who was a party to the interpleader, and is directed to be the Plaintiff on the trial which has been ordered by the Common Pleas to try the right to this furniture. Every equity may now be decided in the Common Law Courts, and they can give effect to the equity so far as it is incidental to the purposes of the defence. That principle was acted upon in *Mostyn* v. *West Mostyn Coal and Iron Company* (1). There may be a serious question whether this alleged settlement gave the wife any separate estate in the after-acquired furniture, since it was not registered under the *Bills of Sale Act* (17 & 18 Vict. c. 36).

In this case there arises the question of *bona fides*, since it is alleged that the furniture now in the house comprises many valuable articles purchased by the husband since his marriage and since his bankruptcy. All these points may be raised by the wife in the Court, where the issue directed by the interpleader is to be tried; and by payment into Court of the debt now claimed, or giving security, the execution may be stayed.

(1) 1 C. P. D. 145.

C. A. 1879

WRIGHT v. REDGRAVE.

Wilkinson, for the sheriff, cited *Runtz* v. *Chadwick* (1).

MALINS, V.C.:—

The point raised in this case is one of very considerable importance. I can only regret that such a question should have been raised on circumstances so unworthy of the serious consideration of the Court.

It appears that Mr. *Wright*, who is a solicitor of this Court of thirty years standing, married the Plaintiff in the year 1861, and on the occasion of his marriage he executed an agreement to assign, in consideration of his marriage, all his household furniture which then was or might thereafter be on the premises No. 6, *Waterloo Street, Birmingham*, or on any other premises where *Wright* and his then intended wife might reside, to a trustee for the separate use of his wife for her life.

Both the husband and wife are still alive, and the result is that this property is now secured for the separate use of the wife. I decided a question of this kind in the case of *Ashton* v. *Blackshaw* (2). There a married woman gave up to her husband a sum of £500 held upon trust for her separate use, upon the understanding that the husband would settle his furniture upon her for her separate use. The husband assigned the furniture to a trustee to hold for the use and benefit of his wife, and the property remained in the joint possession of husband and wife. The assignment was not registered under the *Bills of Sales Act*, and the husband afterwards became bankrupt. The bill was filed to have the assignment reformed, so as to create a binding trust for the separate use of the wife, and to restrain the husband's assignee in bankruptcy from keeping possession of the furniture. I there held that, independently of the *Bills of Sale Act*, the wife would have been entitled to have the furniture secured for her separate use, but in that case there was nothing more than a post-nuptial arrangement, and not a marriage settlement, and therefore it was no more than a bill of sale to a trustee for the benefit of the wife, and being a bill of sale it ought to have been registered under the Act, and as it was not registered, I considered that the furniture

(1) Not reported. (2) Law Rep. 9 Eq. 510.

remained in the order and disposition of the bankrupt, and could not be protected against the assignee.

In this case there is a settlement in consideration of marriage, and the assignment to trustees is perfectly valid. The husband, Mr. *Wright*, has been for some time in difficulties, and on two former occasions, once before Vice-Chancellor *Bacon* and once before me, the question has been raised as to the right of creditors to take possession of this furniture. The same ceremony has taken place as in this case, and the husband has succeeded in defeating his creditors. Here there has been a bill of exchange dishonoured, and the right of *Redgrave*, the holder of the bill, is to sue any of the parties. He has sued *Wright*, and having obtained judgment, proceedings were taken in the Common Pleas Division to prevent the goods being sold to defray the expenses of the husband.

Now the doctrines of this Court clearly are, that with regard to the separate use of a wife, the husband and wife to that extent are separate parties, and nothing can be clearer than that the property of *A.* cannot be taken to pay the debts of *B.* The separate property of the wife therefore cannot be taken to pay the debts of the husband. The wife appeared by her trustees to raise this question, and the result was that the Court made an order that if the debt was not paid, or if the amount was not paid into Court, then and not otherwise the property in question would be sold to satisfy the debt of the husband.

Now the wife cannot provide the £115, the amount of the debt; neither can she pay that sum into Court. What, therefore, is the effect of such an order? That if an execution creditor, with or without knowledge of there being a separate use in the wife, chooses to bring an action, and if he obtains execution, the wife can only have protection by bringing into Court the whole amount of the money sued for. That would, in effect, be doing away with the right of the wife to her separate property. That is not what we consider justice in this Court. But then a question is raised which proceeds upon the fusion of law and equity. It has been pressed upon me that the *Judicature Act* has altered all these doctrines, and, although before the Act this Court could, without doubt, have protected the wife against an execution creditor, yet

C. A. 1879 WRIGHT v. REDGRAVE. Malins, V.C.

now all its power is gone. I understand the 24th section, subsect. 5, of the *Judicature Act* to mean that all questions arising between the same parties must be decided in the same Court; but I do not understand that all questions arising between third parties, who are not the parties suing, must be decided in the same Court, although the Court may have to decide the rights of all the parties.

What, then, is the state of things? The law recognises the separate use of a married woman, just as it recognises the right of a tenant for life, or as it recognises the right to heirlooms. What a state the law would be in if an execution creditor might go to the tenant for life and take possession of property, or to the person entitled to an heirloom and levy upon the heirloom, and the persons whose property was so taken in execution could not be protected unless the trustees could bring the money into Court, which would, in fact, be the whole value of the property. Such a state of things would be repugnant to all principle.

In this case the ownership of the wife is as distinct as of any third party, and she is as much entitled to have her property protected against the debts of her husband as I should have a right to prevent the property in my house being taken to satisfy the debts of my neighbour. I am satisfied that the wife's property ought not to be interfered with, and I can see no reason for coming to the conclusion that there is not a perfectly valid settlement.

With regard to authorities, the case of *Marston* v. *Smith* (before Vice-Chancellor *Hall* on the 28th of June, 1877) has been mentioned by Mr. *Beaumont* as *amicus curiæ*. There the Vice-Chancellor seems to have taken the same view as I do, that it is the duty of the Court to interfere to protect the property of a married woman.

I do not in this case interfere with the order made by the Court of Common Pleas against the husband; all I do is to interfere to protect the wife, who was not a party to those proceedings.

I should not be sorry if the opinion of the Court of Appeal were taken upon this question, which is one of great nicety; but as far as I am concerned, I only decide that the separate property of the wife cannot be taken in execution to pay the debt of the husband. I shall therefore grant the injunction; but there would

be no objection to an inquiry what furniture was in the house at the time the settlement was executed. The Plaintiff may also have a receiver, if it is desirable.

An injunction was accordingly granted to restrain the sheriff from selling the goods until further order, and an order made for the appointment of a receiver.

Redgrave appealed from this decision. The appeal was heard on the 17th of February. C. A.

Glasse, Q.C., and *G. C. Price*, for the Appellant:—

The *Judicature Act*, s. 24, sub-s. 5, is decisive against the jurisdiction to make such an order as this: *Garbutt* v. *Fawcus* (1); *Runtz* v. *Chadwick*. *Marston* v. *Smith* has been referred to as against us, but in that case no order had been made on the interpleader summons, so that the injunction did not restrain proceedings in another Court.

T. L. Wilkinson, for the sheriff.

G. A. Young, for the Plaintiff:—

We do not object to a trial of the interpleader issue, but we object to this, that after the validity of this settlement has been twice tried, we should be subjected to having to pay money into Court as a condition precedent to having it tried again. Such a condition ought not to have been imposed: *Runnacles* v. *Mesquita* (2). This lady was not a party to the original action, and the interpleader proceedings are *res inter alios acta*. The execution of trusts falls within the province of the Chancery Division, and under sect. 24, sub-sect. 7, it has all powers requisite to enable it to do complete justice and protect the property the trusts of which it has to administer; and this modifies sub-sect. 5, and gives the Court by implication a power to grant an injunction. If, however, we have made a mistake, an opportunity should now be given us of making any application to the Common Pleas Division that may be requisite.

(1) 1 Ch. D. 155. (2) 1 Q. B. D. 416.

C. A. 1879 WRIGHT v. REDGRAVE.

JAMES, L.J.:—

I am of opinion that if we were to sustain the order of the Vice-Chancellor we should in fact nullify one of the most salutary provisions of the *Judicature Act*, and interfere with the cardinal principle of that Act, which was that there should never be conflicting proceedings going on at the same time in two branches of the Court. The 24th section of the Act of 1873, sub-sect. 5, puts an end to injunctions to restrain proceedings in other branches of the Court by providing that "No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction." These words are absolute, and are not qualified by anything that follows. The order here is an order restraining a proceeding in the Common Pleas Division. The order of that Division directed the sheriff to sell these goods. The order of the Vice-Chancellor restrains him from selling them and from remaining in possession of them. The 24th section, sub-sect. 5, goes on to provide what shall be done to prevent mischief arising from the abolition of injunctions of this kind. It allows any person, whether a party or not to the cause or matter, to apply to the Court in which the proceedings are going on to restrain the prosecution of them. To make it quite certain that no harm would be done by the abolition of such injunctions, sub-sect. 7 gives to every Division of the High Court power to give all such remedies as any parties may be entitled to in respect of every legal or equitable claim properly brought before the Court. Any *cestui que trust* who has an equitable claim to bring forward must bring it forward in the Division which is seised of the subject-matter, and third parties are not to be embarrassed in their proceedings because parties choose to create trusts. It was an evil that Courts of Equity had to interfere with proceedings in another Court on equitable grounds. A married woman is no more injured than any one else; she can enforce her rights through her trustee; if he is negligent she has a remedy against him, and it is more reasonable that she should suffer for his negligence than third persons who had nothing to do with his appointment. It is urged that the Court must by implication retain the power of granting an injunction because there is a trust to be administered. It was never intended that the pro-

ceedings of third parties should be interfered with on that ground. If the Master in the Common Pleas Division had before him such conclusive evidence of there being a valid settlement of the furniture that he ought not to have imposed the condition of bringing money into Court, that is a ground for appeal from his decision, but does not authorize the Chancery Division to interfere. It is said that the two cases cited before us are inconsistent, but I think they are not. Vice-Chancellor *Hall*, in the case before him, did everything to keep the matter in the Division in which the action was originally brought; and the Master of the Rolls, in the case before him, held that one Division had no jurisdiction to interfere with proceedings in another Division.

BRAMWELL, L.J.:—

I am of the same opinion. The sheriff, under a *fieri facias* against *Wright*, seized these goods as being the property of *Wright*. *Tucker*, the trustee of Mrs. *Wright*, laid claim to them, and the sheriff, in order to protect himself, took out the ordinary interpleader summons. An order was then made, such as is made twenty or thirty times every day, founded on these considerations. The execution creditor says, "These are the goods of the debtor." The claimant says, "No, they are mine." What is to be done until this issue is decided? The sheriff cannot simply withdraw, for the goods may be the goods of the debtor, and if they were given up the benefit of the execution would be lost. There are two ways of proceeding. Money may be brought into Court or security given, in default of which the sheriff is to sell, or he may remain in possession of the goods. The last course is so expensive that it is seldom adopted, so the former is usually resorted to. We have then an order directing an issue, and directing the goods to be sold unless money is brought into Court. That is a pending proceeding. Then is the case within the words of sect. 24, sub-sect. 5? Clearly it is. My only doubt has been whether it is necessary to resort to that section, for I think that if the *Judicature Act* had never passed a Court of Equity would not have interfered. The trustee has claimed the goods, and justice can be done without any other proceedings; for Courts of Law not only recognise the legal title of a trustee, but also

C. A. 1879 WRIGHT v. REDGRAVE.

his claim to stop the sale of property the legal title to which is in the debtor, but under such circumstances that the property is not liable to be taken in execution for his debts. The point has been raised so that justice can be done, and yet the wife comes to another Court to stop the proceedings. It is said that she has no objection to the trial of the interpleader issue, but objects to the goods being sold unless she brings money into Court. She is seeking to get rid of the condition subject to which the order in favour of her trustee was made. I doubt whether she could have obtained an injunction before the *Judicature Act.* If she could not, she cannot now; if she could, the Act precludes her doing so. If before the interpleader summons had been taken out an action in equity had been commenced on the ground of difficulty arising from the existence of the trust, though I do not understand such an action, it might be that the Chancery Division could interfere on the ground that there was no interference with the Common Pleas Division, because the order to the sheriff was to seize the goods of *Wright,* not goods held by *Tucker* in trust for Mrs. *Wright;* but as matters stand, the order under appeal is altogether wrong. Nothing turns on the fact that the *cestui que trust* was a married woman. The case is the same as if the trust had been for a single man.

BRETT, L.J.:—

The terms of the 5th sub-section are absolute and without any exception, so that there cannot be any prohibition or injunction by one Division of the Court to restrain proceedings in another Division. The interpleader order is a pending proceeding, and part of that order is that the sheriff shall sell. The order under appeal is that he shall not sell, and that is, in effect an order restraining a proceeding in the Common Pleas Division. There is nothing in the subsequent part of sub-section 5 to lessen the generality of the other part. It is said to be a hardship that, after the validity of the settlement has twice been in issue, it should be tried again. The time for urging that argument was when the case was in Chambers. If I had been in Chambers, and it had been clearly proved before me that the validity of the settlement had twice been tried, and that the goods in question were the same, I should

have declined to make an interpleader order, and should have directed the sheriff to deliver the goods to the trustee. If it did not appear clearly in evidence that the goods were the same, I should have directed an issue whether they were the same goods that had been seized before. An interpleader order, however, was made, and it is said that there is hardship in directing the ordinary payment of money into Court. That is matter for appeal; there is no such appeal before us, and we cannot interfere with that order. Then it is said that the action in the Chancery Division must proceed for the purpose of appointing a new trustee, and that it is a hardship that proceedings should go on in the Common Pleas Division when the present trustee has refused to do anything further. All that can be done as regards that is to apply to the Common Pleas Division to stay proceedings till the new trustee has been appointed. It is said that *Marston* v. *Smith* is an authority in favour of the Respondent, but it seems to me to support our view. In that case no interpleader order had been made, and Mr. Justice *Lindley* stayed his hand till the proceedings in Chancery had been concluded. That is no authority for the proposition that the Chancery Division, notwithstanding sub-section 5, can restrain a proceeding in the Common Pleas Division.

The order for an injunction was discharged without prejudice to the appointment of a receiver of the trust property other than the goods which formed the subject of the interpleader order.

Solicitors: *W. Maynard; Joel Emanuel; John Holder.*

C. A.
1879
V.-C. H.
Jan. 17.
C. A.
Feb. 19.

In re RICA GOLD WASHING COMPANY.

Company—Winding-up Petition—Fully paid-up Shareholder.

A fully paid-up shareholder who presents a petition to wind up the company must both allege in his petition and shew by evidence that there are assets of the company of such an amount that in the event of a winding-up he would have a tangible share of surplus to receive.

On a winding-up petition, as well as in an action, a vague allegation of fraud is not sufficient, but the facts which constitute the fraud must be stated, and if there is only a vague general allegation of fraud, evidence of the acts of fraud is not admissible.

Whether a winding-up petition by a fully paid-up shareholder can be maintained where the company has no assets except moneys to be recovered by rescinding fraudulent transactions properly alleged in the petition, *quære*.

THIS was a petition by a fully paid-up shareholder of the *Rica Gold Washing Company* for a winding-up order.

The statements of the petition were to the following effect:—

1. That the company was a company limited by shares registered under the Companies Acts.

2. That the company was one of three gold washing companies, which were got up under the same management within short intervals from each other, ostensibly for the purpose of acquiring and working for the benefit of the shareholders certain auriferous deposits in *Columbia*, "but really for the purpose of enabling the promoters (several of whom were and are directors of the said companies) to appropriate and distribute among themselves large profits at the expense of the said companies and the shareholders thereof."

3. That the names of the other two companies were the *Malpaso Gold Washing Company, Limited*, and the *Malabar Gold Washing Company, Limited*.

4. "The management of the affairs of the said companies from the date of the formation thereof up to the present time has continued and still remains in the hands of the promoters thereof and their nominees, and in consequence thereof there has been no independent examination or investigation of their affairs."

5. "The said companies and each of them have wholly failed to attain the objects for which they were ostensibly formed. No

profits have been realized by any or either of the said companies, but, on the contrary, great losses have been sustained by all and each of them. The said promoters, however, have succeeded by means of the said companies, and the contrivances adopted by them in connection with the formation thereof, and the sale of the shares therein, in unlawfully appropriating, and they have in fact unlawfully appropriated to and among themselves very considerable profits."

6. That the Petitioner was induced to become and still was a shareholder in each company, and that he was presenting petitions concurrently with the present petition to wind up the other two companies.

7. That the memorandum and articles of the *Rica Company* were dated the 19th of March, 1872, and were registered shortly after that date.

8. That the objects of the company, as stated in the memorandum were (*inter alia*) to carry into effect an agreement of the 12th of March, 1872, between *Rogers* of the one part and *Cobbett* and *Pechey* of the other part for the purchase by the company from *Rogers* of certain property in *Columbia*.

9. That by the memorandum and articles the capital was to be £50,000 in £1 shares.

10. That the articles provided (Art. 53) that the number of directors, not being less than three, should from time to time be determined by a general meeting.

11. That by Art. 54 the first directors were to be the above-named *Cobbett* and *Pechey* and *R. B. Barrow*.

12. That by Art. 63 the directors might within the time therein named increase the number of directors.

13. That immediately after the registration the above-named *Rogers* was added as a director under Art. 63.

14. That *Rogers*, *Pechey*, and *Barrow* were subscribers to the memorandum and articles, and promoters.

15. "The promoters and directors of the company, for the purpose of procuring subscriptions for and selling its shares to the public, issued and published a prospectus of the company which contained various untrue, misleading, and deceptive statements with regard to the property comprised in the said agreement, and

C. A. 1879

In re RICA GOLD WASHING COMPANY.

the advantages which might be expected to be obtained by persons who should become shareholders of the company."

16. That one of the promoters was *Cobb*, who rendered assistance in the disposal of the shares of the companies by the publication of a monthly *Investment Circular*, in which he, in the character of a stockbroker, gave advice to parties seeking investments.

17. That *Cobb*, in his circular, spoke of the shares in these three companies in high terms, and advised that they should be purchased without delay.

18. "By the means above referred to subscribers were obtained for the whole of the shares of the *Rica Company* other than the vendors and promoters' shares, and a large number of the vendors and promoters' shares were disposed of for the benefit of the vendors and promoters."

19. "The Petitioner perused copies of the said prospectus and of the said *Investment Circular*, and subsequently purchased seventy-five of the said shares in the *Rica Company*. The Petitioner is now and for six months past has been the holder of seventy-five shares in the said company."

20. "The operations of the *Rica Company* were from the commencement unsuccessful. The said company in a short time exhausted the funds available for the purpose of its business, and it has for several years past ceased to carry on any business. It has no means of raising further capital, and there is no prospect that the business of the company could be recommenced with any advantage even if further capital could be procured."

21. That it was just and equitable and absolutely necessary in the interests of the Petitioner and the other shareholders in the company who had paid for their shares that the *Rica Company* should be wound up by the Court.

The Petitioner filed an affidavit echoing the statements of his petition. *Cobbett*, *Pechey*, and *Rogers* made an affidavit in opposition. They denied the statements in paragraph 5 of the petition; stated that *Rogers* was not elected a director till after the purchase from him had been completed; stated that the Petitioner was only a holder of fully paid-up shares; denied the allegations in paragraph 15; denied all connection with the *Investment Circular*; gave reasons for the delay in carrying on the operations

of the company; stated that the company had no liabilities except a sum of £2006, due to themselves and one *Henry Drake;* that 40,000 shares had been subscribed for, of which they themselves held 3705; and that eighty-six shareholders, holding in all 16,475 shares, had authorized the directors to oppose the petition on their behalf.

The deponents were cross-examined before a special examiner upon their affidavit. It appeared that the property purchased by the company from *Rogers* was bought for £20,000 in cash and £15,000 in paid-up shares, and it was contended by the Petitioner that on the facts appearing on this cross-examination the company was entitled to set aside the sale and have the £20,000 repaid.

The petition to wind up the *Malpaso Gold Washing Company,* which was very similar, came on at the same time with this petition, before Vice-Chancellor *Hall,* on the 17th of January, 1879.

Dickinson, Q.C., and *Bradford,* for the Petitioner.

W. Pearson, Q.C., and *Grosvenor Woods, contrà.*

Welby King, for other shareholders.

HALL, V.C.:—

It appears to me that upon this petition there is no case stated in which the Petitioner is entitled, *ex debito justitiæ,* to have an order made to wind up this company; on the contrary, it appears to me, as far as I can collect from the facts stated upon this petition, that this is a case in which it would be a mere idle and absurd ceremony to go through the form of winding up this company.

The Petitioner has no further interest than as the holder of seventy-five fully paid-up £1 shares. He has presented a petition for the winding-up of this concern, and the ground which seems to have influenced him very much in taking this course is that the company, as he alleges, was got up by certain persons, who are named, for the purpose, I may say, of robbing the people who should be induced to become shareholders through the medium of a false prospectus. That is the case he makes, and he says that robbery was committed by creating a certain number of shares

C. A. 1879 *In re* Rica Gold Washing Company.

with which, when paid up, the promoters could go into the market and dispose of them, and that they did so. The Petitioner says, "I want all those things thoroughly investigated, and the proper mode of doing that is by winding up the company, and I shall then bring forward and make out a case of that kind, and I shall get back my £75, or some portion of it." Now, as regards his own individual equity founded upon any such case, he does not tell us when he acquired the shares. This company has been in existence now for several years—I believe it began business in 1871, or thereabouts. The Petitioner says the prospectus was false. He does not say that he acted upon the faith of the prospectus; he does not say that the shares he bought were original shares, or if not that the persons who took them were deceived; nor does he say that he is entitled to stand in the shoes of persons who were deceived by the prospectus.

The Petitioner's object is to have an investigation into these transactions, which investigation would cost in all probability, not merely hundreds, but thousands of pounds, and whether money would be ever recovered from the persons who were convicted, if they were convicted, of fraud, I do not know. According to my experience in these matters, even if the litigation were successful as against the persons sought to be charged, it is not probable that, after payment of costs not payable by the Defendants, there would be one available sovereign for distribution amongst the shareholders.

That is the nature of the case made through the medium of which the Petitioner seeks to get back his £75, or some portion of it. It is not disputed that the company has not got assets, and that the mine is worth nothing. Under these circumstances it appears to me that I cannot treat this as being a substantial and *bonâ fide* petition, and I therefore decline to make any order upon it. The petition is opposed by a very large number of shareholders, although it is supported by a considerable number of other shareholders. I dismiss the petition with costs.

The *Rica Company's* case was not argued, counsel for the Petitioner stating that he could not distinguish the case from that

of the *Malpaso Company*, except on the ground that the company had not carried on business for several years, an allegation which the Vice-Chancellor considered to be unfavourable to the Petitioner, as it shewed a delay which was not explained.

The Petitioner appealed. The appeal was heard on the 19th of February. C. A.

Dickinson, Q.C., and *Bradford*, for the Appellant:—

The evidence shews a case for inquiry and a ground for believing that the sale to the company can be set aside, and that considerable assets can thus be recovered to be divided among the shareholders, and that the continuance of the business is hopeless. It is therefore just and equitable that the company should be wound up.

[JESSEL, M.R.:—I do not find any sufficient grounds stated on your petition to warrant a winding-up order. You must succeed *secundum allegata et probata*. Facts must be stated. An allegation that it is just and equitable is not a statement of a fact, but of an inference of law.

BRAMWELL, L.J.:—But if the opposing party says, "I know what you mean, and do not ask for any more specific allegations," and then fights the case on the merits, can the objection be raised on appeal?]

We submit it cannot. It is like the case of a person sued for infringing a patent who does not ask for particulars of breaches.

[JESSEL, M.R.:—If your opponents had been heard below and had fought the case on the evidence without taking any objection to the form of your petition, there might have been some ground for the argument that they had waived any such objection, but they were not called upon.]

They have entered into evidence.

[JESSEL, M.R.:—That is no waiver of an objection to the form of the petition.

BRAMWELL, L.J., referred to *In re Steam Stoker Company* (1),

(1) Law Rep. 19 Eq. 416.

C. A. 1879

In re RICA GOLD WASHING COMPANY.

and JESSEL, M.R., to *Bush* v. *Trowbridge Waterworks Company* (1).]

The Court will give leave to amend.

[JESSEL, M.R. :—If you can make out that your evidence shews with reasonable certainty that there will be a substantial surplus divisible among fully paid-up shareholders, that may be a reason for giving leave to amend.

W. Pearson, Q.C., and *Grosvenor Woods, contrà*, and

Welby King, for shareholders, who appeared to oppose, were not called upon.

JESSEL, M.R. :—

This is an appeal from the decision of Vice-Chancellor *Hall* dismissing a petition to wind up the company, on the ground that it was not a *bonâ fide* petition, and that the Petitioner, as I read the judgment, had not sufficient interest to support it.

The petition is the petition of a clergyman, who says that he holds seventy-five shares of £1 each in the company. He does not tell us when he acquired them, but he says that he purchased them in the market. The only allegation that I can find as to how long he has been a shareholder, is, that he is now, and for six months past has been, the holder of the shares. Of course it is consistent with that that he has been a holder for a longer period. He does not tell us exactly when the company was registered, but he says that it was registered shortly after the 19th of March, 1872. Therefore we may take the establishment of the company to have been in March, 1872, and the petition in question was presented on the 25th of October, 1878, which is more than six years after the formation of the company. The Petitioner's shares are fully paid up.

Now I will say a word or two on the law as regards the position of a Petitioner holding fully paid-up shares. He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the

(1) Law Rep. 10 Ch. 459.

debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorize him to present a petition. That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course the Petitioner must shew the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say "a sufficient interest," for the mere allegation of a surplus or of a probable surplus will not be sufficient. He must shew what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he shewed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding-up, would give him £5, I should say that would not be sufficient to induce the Court to interfere in his behalf.

That being the state of the law, I will first of all mention generally how this petition is wrong, and then I will discuss it a little in detail. The petition contains vague allegations of fraud; but I have always understood it to be a rule in equity that where you allege fraud you must state the facts which constitute the fraud. You are not entitled on a petition any more than in an action to say to the other side, "You have defrauded me; you have obtained my money by fraud." You must state the facts which you say amount to a fraud, so that the other party may know what he has to meet. I agree that it is not necessary to state the evidence which shews the fraud, but you must state the facts which constitute the fraud. In the next place, of course you must shew that the relief to be obtained on the ground of the fraud would increase the assets of the company; and even then I am not prepared to go this length, that if a petitioner shews that there are no other possible available assets except those which may be obtained by the successful prosecution of proceedings against directors or others to get back money which they are liable to pay by reason of some fraud committed, that would as a general rule be sufficient to support a winding-up petition. I think it would not. I think the rule should be as a general rule, first establish your fraud, and get the money, and then present your petition to divide it—for that is the object of a winding-up petition by a fully paid-up shareholder. There will be, no doubt,

C. A. 1879 *In re* RICA GOLD WASHING COMPANY. Jessel, M.R.

some exceptions. One which I think worth mentioning is where the majority of the shareholders side with the directors or other persons who have committed the fraud, and so prevent the company's bringing an action to make them liable. In that case I can well understand the Court saying that, as the minority of the shareholders who are entitled to complain of the fraud cannot themselves institute an action in the name of the company, they may invoke the assistance of the Court to wind up the company, so that by the means of the liquidation such an action may be brought or proceedings may be taken under the 165th clause of the *Companies Act.*

Having said thus much, I will state what the allegations are, and why I think them vague and unsatisfactory. The first allegation is contained in paragraph 2 of the petition, which states this:—[His Lordship read the second paragraph.] That is not an allegation of fraud at all. Promoters, I should imagine, do not intend to work for nothing, or to work otherwise than for profits, and generally for large profits. Then it states the names of the companies, and then it states this:—[His Lordship read paragraph 4.] On first reading this clause I thought that it might possibly amount to an allegation that the majority of the shareholders sided with the persons accused of fraud, but when you come to examine it, it does not amount to that. It obviously relates to the management of the business of the company, and does not shew that the directors will necessarily command a majority in general meeting. Then the 5th paragraph states this:—[His Lordship read the paragraph.] That is open to the objection of being a vague and indefinite charge of illegality of some kind. I cannot find out what the directors have done. It says that there have been some contrivances in connection with the formation of the company and the sale of the shares therein. What does that mean? To whom did they sell the shares? It is said that they have made profits. What profits? How have they made profits? At whose expense? There is not a word of allegation to shew that the profits they have made have been by misappropriating the assets of the company, and besides that, the Petitioner lumps together the charges as to the three companies and the promoters, and he has not said that they have made a

shilling of profit separately out of this company. It is quite consistent with the allegation that they made large profits out of the other two companies and none out of this. That may be called hypercritical, but when we come to deal with vague allegations of this kind I think no criticism is too severe. People are not to be brought into Court on a vague charge of fraud of this kind. Then the Petitioner goes on to say that "he was induced to become and still is a shareholder in each of the said companies. He has caused to be prepared and intends to present petitions for winding up the said *Malpaso Gold Washing Company, Limited,* and the said *Malabar Gold Washing Company, Limited,* concurrently with the present petition. The Petitioner craves leave to refer to the said petitions respectively." Then he states that there were a memorandum and articles of association, by which it appears that a certain contract was made, but there is no allegation that the contract which was a contract for the purchase of a mine was ever carried out. Then we have this allegation :—[His Lordship read clause 15.] That, again, is a vague and most improper charge of fraud. It is not sufficient to say that the prospectus contained various untrue, misleading, and deceptive statements. The Petitioner ought to say what they were, and state which of them were untrue. Besides that, it does not appear that that prospectus was a representation made to the company at all, or one upon which the company can maintain an action or obtain damages or compensation to increase the amount of its assets. Then there is a reference (paragraph 16) to one of its promoters, who was a broker, and who sent out a circular called "*The Investment Circular,*" in which he spoke in very high terms of the company. [His Lordship then read the 18th and 19th paragraphs.] He does not say that he was induced by the circular or by the prospectus to buy, but simply that he bought. If he were defrauded, of course his remedy would be an action as an individual against the person or persons who defrauded him ; but that would not in the least increase the assets of the company. [His Lordship then read the 20th paragraph of the petition.] That is an allegation of insolvency, certainly of commercial insolvency, but there is nothing else in the petition to shew assets. There is nothing to shew that any one of these alleged frauds ended in abstracting moneys from the assets of the

C. A. 1879 *In re* Rica Gold Washing Company. Jessel, M.R.

company which the parties committing the fraud are liable to pay. Therefore, really, when the petition is fairly looked at, there is no allegation of any assets left, much less of there being any surplus in which the Petitioner could participate after payment of the debts and costs of the winding-up. It seems to me as clearly a demurrable petition as I ever saw.

But what was the case presented to us in argument? It was a totally different one. It was said that the mine was sold to the company under circumstances which would entitle the company either to rescind the contract or to obtain from the persons who sold it a very large sum of money, stated at £20,000. The answer is that there is not a word of this in the petition. There is no allegation of the sale, or of the completion of the purchase, or of the payment of the money, or that the money came out of the coffers of the company, or that anybody is liable to repay it. Those allegations ought to have been made if any reliance is to be placed upon such a case.

I have to add one word more about the amount of the Petitioner's claim. I am sorry to say I have had a very lengthened experience in winding-up cases, both at the Bar and on the Bench, and I cannot believe that a shareholder who has seventy-five £1 paid-up shares can imagine that he has sufficient interest to make it worth his while to present a winding-up petition. Of course I am not going to say there might not be a case in which £75 would be payable to him, but it is very unlikely and very improbable. We must look at the extent of his interest as reasonable men, and as men having experience in these matters, and speaking as such, I have no doubt that, as the Vice-Chancellor says, this is not a *bonâ fide* petition, but a petition presented with a very different object than that of obtaining for the Petitioner the £75, or any part of it. In my opinion it is either presented for the purpose of obtaining costs, or for the purpose of annoyance to some other person or persons; and I entirely agree with the Vice-Chancellor that it is not a *bonâ fide* petition. Therefore I think we must dismiss this appeal.

Bramwell, L.J.:—

I am of the same opinion.

BRETT, L.J. :—

It seems to me that this case depends partly upon the rules of pleading under the *Judicature Act*, and partly upon the facts; and the judgment of the Vice-Chancellor comes to this: that assuming all the facts which are alleged on this petition to be proved by any evidence which could be brought forward, it could not be shewn that any tangible amount would ever come to the Petitioner, and, inasmuch as the Petitioner is a paid-up shareholder, he, therefore, has not shewn sufficient interest to support this petition. It seems to me, without referring to the old rules of pleading in equity, that we are bound by the rules of pleading under the *Judicature Act;* and by those rules of pleading I apprehend that every fact must be stated which would have to be proved in order to support a cause of action. It is necessary, therefore, to shew that there are facts stated on this petition which, if proved, would satisfy the Court that some tangible amount might come to the Petitioner.

Now it is not suggested here that there are any what you may call real assets of this company. Whether it is alleged that it is insolvent or not I care not to inquire. There are no assets in hand, and the only moneys which it is said could be bought in so as to become available for the Petitioner are moneys to be recovered from somebody on the ground that they have been obtained by fraud. One fraud relied upon before us in argument was, that the estate had been sold and purchased under fraudulent circumstances. The fatal objection to any reliance being placed upon that, to my mind, is that there is no allegation of that nature in the petition, and therefore no evidence can be brought forward to support this contention.

Then it is suggested that there are other frauds. It is suggested that the promoters or directors of this company had received money for shares and had embezzled it; but I apprehend that under the present rules of pleading you must state how the money was embezzled. There is no allegation that they had received money from the company or had embezzled it, and proof of those facts is therefore inadmissible.

Then the only other suggestion is that they obtained money by false representations. It ought to be shewn that they made false

C. A. 1879 *In re* Rica Gold Washing Company.

representations to a person who acted upon those false representations. I can find no allegation of that sort in this petition. There is, therefore, no allegation in this petition of any fraud which, if it were proved, would bring money to any person through whom the company could get any benefit.

With regard to what the Master of the Rolls has said as to whether the Court would order a winding-up on the application of a fully paid-up shareholder where the company has no assets except moneys to be recovered under a case of fraud alleged and proved, I for the present, with great deference, decline to give an opinion, because I think the question is not raised in this case.

Therefore I entirely agree that the judgment of the Vice-Chancellor must be supported.

Solicitors: *Snell & Greenip*; *Stevens & Harries.*

C. A. 1879 Feb. 13, 14.

Ex parte WELCHMAN. *In re* HARE.

Deceased Insolvent Debtor—Property acquired after Final Order—Vested Reversion falling into Possession after Death of Insolvent—Rights of Official Assignee and of Unsatisfied Creditors—5 & 6 Vict. c. 116, ss. 7, 9, 12—7 & 8 Vict. c. 96, ss. 4, 8, 10, 73—Bankruptcy Repeal Act, 1869 (32 & 33 *Vict. c.* 83), *s.* 15.

20 Ch D 641
24 Ch D 676
681

Sect. 9 of the Act 5 & 6 Vict. c. 116, applies only to a living insolvent, and does not enable the assignee of a deceased insolvent to obtain possession of property which, though it becomes vested in the insolvent in reversion expectant on a life estate after his final order, does not fall into possession until after his death.

In such a case the proper remedy of the unsatisfied creditors under the insolvency is to commence an action for the administration of his estate.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

On the 10th of August, 1859, *W. R. Hare*, who had formerly resided at 44, *Halfmoon Street*, but who was then in *Whitecross Street Prison*, filed his petition for protection under the Acts 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. On the 18th of August he obtained an interim order for protection and for his discharge from

prison. On the 18th of December, 1861, he obtained his final order. On the 30th of January, 1866, by virtue of the death of a Mrs. *Bankhead* without issue, he became, as one of her next of kin, under the trusts of her marriage settlement, dated the 14th of December, 1825, entitled to a distributive share of the trust funds, subject to the life interest of her husband, who survived her. *Hare* died in 1867. Mr. *Bankhead* died on the 11th of March, 1870. In August, 1871, a bill was filed in the Court of Chancery to execute the trusts of the settlement. The insolvency of *Hare* and his death were stated in the bill, but his official assignee was not made a party to the suit, nor was any notice of it given to him. Afterwards the share of the insolvent was carried over to a separate account, and directed to be transferred to his legal personal representative (when constituted). On the 20th of April, 1878, administration to the personal estate of the insolvent was granted to Mrs. *Welchman*. In May, 1878, the official assignee for the first time had notice of *Hare's* interest under the settlement. On the 1st of June, 1878, he applied by summons in the suit to have the fund which was standing to the separate account transferred to him. On the 5th of July, Vice-Chancellor *Hall* dismissed the summons, on the ground that the fund did not vest in the assignee under sect. 4 of the Act 7 & 8 Vict. c. 96.

On the 12th of July the assignee filed, under sect. 9 of the Act 5 & 6 Vict. c. 116, a copy of his claim to the fund standing to the separate account; and on the 15th of July the claim was served on the administratrix. On the 22nd of July the assignee obtained from the *London* Bankruptcy Court a rule *nisi* calling on the administratrix to shew cause why the fund standing to the separate account should not be transferred to him. The case was heard by Mr. Registrar *Brougham* on the 28th of November, when he made an order giving leave to the assignee to apply in the suit for payment of the fund to him. The administratrix appealed.

Phear, for the Appellant:—

The order, though it only gives leave to the assignee to apply in the action in the Chancery Division, absolutely determines his right to the fund; his right could not afterwards be questioned

BIBL. LONDIN

C. A. 1879

Ex parte WELCHMAN. *In re* HARE.

in the action. Sect. 9 of the Act 5 & 6 Vict. c. 116, limits the generality of the words of sect. 7, and sect. 9 (1) does not apply where the insolvent is dead. It only enables the assignee to obtain property acquired by an insolvent after his final order and during his life.

The service is to be "on the petitioner personally or by leaving it at the place of residence mentioned in his notice of petition," but in either case it is to be service on the petitioner. That cannot apply to the case of a dead man. And, if service might be effected at the petitioner's last place of abode, he had no place of abode at the time when he presented his petition, as he was then

(1) Sect. 7 provides that, "From and after the passing of the final order the whole estate, present and future, as well real as personal, and as well in the colonies, dominions, and plantations belonging to Her Majesty, as in the United Kingdom of *Great Britain* and *Ireland*, all the effects and all the credits of the petitioner, shall become absolutely vested in the official assignee and assignee chosen by the creditors, without any deed or conveyance."

Sect. 9: "The said assignees shall be entitled to claim and demand from the said petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made; and all such estate and effects, of what kind soever and wheresoever situate, shall be absolutely vested in such assignees upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition, and they shall hold the same in like manner as they held the estate and effects of the petitioner transferred by force of the final order, as hereinbefore provided: Provided always, that no assignee of any insolvent shall be authorized by virtue of this Act to take possession of any estate or effects which the insolvent shall have acquired or become possessed of after the making of the final order herein mentioned, except under the authority of an order of the said Commissioner, or of the Court of Review in bankruptcy, made for that purpose, and then only to the extent and at the time and in manner directed by such order, and after giving such notices, and doing such acts, matters, and things, as by the rules, orders, and regulations made under the authority of this Act shall be required and directed in that behalf."

And by sect. 4 of 7 & 8 Vict. c. 96, "The property of the petitioner shall, for the purposes of the said recited Act (5 & 6 Vict. c. 116) and of this Act, vest in the assignee or assignees for the time being, by virtue of the appointment of such assignee or assignees; and every such assignee shall be deemed to be an officer of the Court in which the petition shall be filed, and shall be liable as such to the control thereof: Provided always, that the property of the petitioner shall in every case be possessed and received by the official assignee alone, save where it shall be otherwise directed by the Commissioner."

in prison. Sect. 4 of the Act 7 & 8 Vict. c. 96, is substituted for sect. 7 of the former Act. The appointment of the assignee does not vest the property acquired after the final order in him: *Platel* v. *Bevill* (1). Sect. 73 of the later Act defines the meaning of the word "property."

Langley, for the official assignee:—

Platel v. *Bevill* only shews that the Court made the obscure provisions of the Act subordinate to those the meaning of which is plain; the judgment is in favour of my argument. Sect. 8 of the later Act provides that if the petitioner "shall die after the filing of his petition, the Commissioner may proceed in the matter of such petition for the discovery and distribution of his property as he might have done if the petitioner were living."

[JAMES, L.J.:—That only provides for his death between the filing of the petition and the final order.]

Sect. 12 of the earlier Act enables the assignee to apply to have the final order rescinded. The insolvent committed a fraud by concealing his property; if he had obeyed the law we should have been able to make the application in his lifetime. The Act was not intended to cover fraud.

[BRETT, L.J.:—He may not have known of his interest.]

At any rate he disobeyed the law. The true meaning of sect. 9 is that, if the property vests in the insolvent during his life, the assignee shall take it, even after his death.

[JAMES, L.J.:—Why cannot the unsatisfied creditors commence an action for the administration of the insolvent's estate? What jurisdiction is there to take the property away from the legal personal representative? Bankruptcy is put an end to by the death of the bankrupt.]

The assignee is a trustee for the creditors. Sect. 15 of the *Bankruptcy Repeal Act*, 1869 (32 & 33 Vict. c. 83), provides that every insolvency pending at the commencement of that Act (*i.e.*, the 1st of January, 1870) "shall, at the expiration of twelve months from the commencement of this Act, or at the expiration

(1) 2 Ex. 511, 519.

C. A. 1879 *Ex parte* WELCHMAN. *In re* HARE.

of twenty years from the date of the filing of the petition (whichever last happens), be closed." The insolvent, therefore, after the twenty years, gets all the privileges of a discharged bankrupt, but it does not follow that during that period he has the disabilities of an undischarged bankrupt. *Barton* v. *Tattersall* (1) shews that, in the administration in the Court of Chancery of the estate of a deceased insolvent debtor, debts incurred after the insolvency would be paid in priority to those scheduled under the insolvency. But the administratrix ought to have shewn that there are other debts than those of the creditors under the insolvency.

[JAMES, L.J.:—She must have paid money to procure the letters of administration. How can we take the assets from her?]

Sect. 10 of the later Act shews that "property" was intended to include property acquired after the final order.

JAMES, L.J.:—

I am of opinion that this order must be discharged. It seems to me that it was applied for unnecessarily, unless it was for the purpose of taking the whole of the assets out of the hands of the legal personal representative of the insolvent, leaving her without anything either to pay new debts, or to repay herself any money which she may have advanced even for the expenses of administration. The statute has not left the creditors under the insolvency in any way in an unfair position, according to the construction which I put upon it; it has not left them without any remedy by reason of the death of the insolvent, because on his death whatever real assets he had vested in his heir-at-law, and whatever personal assets he had vested in his legal personal representative, those assets, whatever they may be, would have to be administered in a due course of administration by the person in whom the law has vested them. In the case of *Barton* v. *Tattersall* Sir *John Leach* says that the Acts had laid down the course and the mode in which the assets are to be dealt with, viz., in paying first the new creditors, and afterwards the old creditors, and that a Court of Equity had jurisdiction so to administer them. Therefore there is no necessity for the old creditors to come to the Court of Bank-

(1) 1 Russ. & My. 237.

ruptcy at all. Therefore we approach the construction of the statutes with this knowledge—that there is really nothing whatever depriving the creditors under the insolvency of any rights as between them and the volunteers under the intestacy, but only as between them and any new creditors, or in respect of any other equitable rights which may have arisen.

Then what is the effect of these two Acts? The first Act, as now construed and modified by the second, clearly vests in the assignee the whole property which the insolvent had, in possession or in right, up to and at the time of his petition, and thenceforth up to and at the time of his getting his final order. That property is vested absolutely in the assignee, as is shewn by the interpretation clause, sect. 73 of the second Act. But then it was thought rightly enough that the creditors whose debts were not satisfied, and who had been prevented from suing the insolvent, and whose ordinary remedies were suspended, ought not to be left entirely unprovided for, if, from any change of circumstances, the insolvent debtor who had obtained protection should become possessed of property out of which he ought in justice and honesty to make a provision for his creditors.

Well, then, machinery is provided for the purpose of enabling the assignee to take possession of those new assets, and that machinery throughout, as it seems to me, applies only to a living man, just as, under the former Acts, a judgment could be entered up only against the insolvent himself, and could not be entered up against his heir or his legal personal representative after his death.

There is nothing, as it seems to me, which enables the Court to summon before it the legal personal representative or the heir-at-law of a deceased insolvent to render an account or to shew cause why the new assets ought not to be taken by the assignee. There is no machinery provided for that purpose, and this is a very special jurisdiction given to a special tribunal which has to deal with insolvent debtors. But, when other rights have accrued, when a right has vested in the heir or the legal personal representative of a deceased insolvent, it appears to me that there is no reason whatever why the Court of Bankruptcy should have over such persons an exceptional jurisdiction, or why everything should not be left to be decided by the ordinary tribunals of the country

C. A. 1879

Ex parte WELCHMAN. *In re* HARE.

Therefore I see no reason whatever why we should endeavour to put words into the 9th section which we do not find there, and say that the words "insolvent debtor" are to include the legal personal representative of an insolvent debtor.

Then as to the claim which is to be "served upon the petitioner personally or by leaving it at the place of residence mentioned in his notice of petition," how is it to be served upon persons with respect to whom no provision for service is made, and how are they to be called upon to shew cause why some part of the property should not be taken out of their hands? I see no reason whatever why we should strain the words of the section for the purpose of giving the Court jurisdiction over such persons. There appears to me to be no difficulty whatever in applying the ordinary machinery of the law for the purpose of having whatever assets there may be of the deceased applied in a due course of administration. And, even if the matter had depended upon the latter clause of sect. 9, the Court could exercise a reasonable discretion. It is true that the assignee could not commence an administration action, because his right depends entirely upon the statute; but each of the creditors in his own right in respect of his unsatisfied debt would have the same rights as any unsatisfied creditor of a testator or intestate would have.

I am of opinion, therefore, that this order was unnecessarily applied for and was improvidently granted, the Court having no jurisdiction to make it, and that it must be discharged.

BRAMWELL, L.J.:—

I am of the same opinion. It must be admitted that this is an obscure section. It is very remarkable. It says that in a certain event, that is to say, the filing by the assignees of a copy of their claim, all the property acquired after the final order shall be absosolutely vested in them. It then goes on to say that, nevertheless, they cannot take possession of any part of the property without an order of the Commissioner or of the Court of Review. Now at first I endeavoured to see whether we could not strain the words a little in order that that most desirable thing should be accomplished, viz., that the creditors should get paid, and it occurred to me that there was a possibility of reading the section

in this way, that the property was to vest in the assignees upon their filing a copy of their claim, and they were to serve the claim on the insolvent personally or at the place of residence mentioned in his notice of petition. Then, if that was the true construction, if he had died and the service could not be effected, it was not a condition precedent, but the property vested upon the filing of the claim, and I should have been inclined to say that that was the law, rather than that the property should go to the representatives of the insolvent, his legatees or devisees, instead of to the persons to whom he was indebted. But when we find that that is not the case, that the creditors are not without remedy, and that their remedy would be attended with this equitable circumstance, that the claims of other creditors and of the administrator or executor of the insolvent would be taken into account, there is really no reason for straining the words of the section. And certainly the words tend to shew that the first thing to be done is to serve the petitioner with the claim, and then to file a copy of it, and consequently that the Legislature contemplated that this sect. 9 should apply only when the insolvent was still alive. That certainly does seem to be the more natural interpretation of it. Whether the draftsman had it in his mind or not is another question; but very often, whether the question arises upon an Act of Parliament or an agreement, Courts have to discover what provision has been made for the happening of an event which was not in the contemplation of the person who drew the Act or the agreement. But, however that may be, I agree that the natural meaning of the words is that which has been put upon them by the Lord Justice. And, moreover, I think that, if this were a matter of discretion, there is no reason why we should not refer the unsatisfied creditors to their remedy in an action for administration.

BRETT, L.J.:—

It seems to me that the Court had no jurisdiction to make the order. It is an order affecting property acquired by the insolvent after his final order. I think it is clear that the only section which applies to such property is the 9th, and the order cannot be made unless under the 9th section such property might vest in

C. A. 1879 *Ex parte* WELCHMAN. *In re* HARE.

the assignee. Now the right of vesting property in the assignee is not a common law right. It is not a common law right, the mode of exercising which is regulated by statute; it is a right created by the statute. It is created by the 9th section, and that being so, if there are conditions on which alone it can rest, it cannot exist unless those conditions are fulfilled. It seems to me that we ought not to construe that section otherwise than according to its ordinary grammatical construction; there is nothing which authorizes us to construe it otherwise. And, according to its ordinary grammatical construction, when it says that the estate and effects shall vest in the assignees "upon their filing a copy of their claim served upon the petitioner," the fact of service of the claim on him is a condition precedent to the vesting, and when the man is dead that condition cannot be fulfilled. Therefore, if the condition cannot be fulfilled, the right does not arise, and the property cannot vest. Consequently the Court has no jurisdiction to make such an order after the death of the insolvent.

Solicitor for Administratrix: *A. S. Edmunds.*
Solicitor for Assignee: *A. S. Twyford.*

C. A. 1879 *Feb.* 20.

Ex parte DITTON. *In re* WOODS.

Appeal—Locus standi of Appellant—"Person aggrieved" by Order—Alleged Creditor of Bankrupt—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.

14 Ch D 458-9 464-7

A person who alleges himself to be a creditor under a bankruptcy, but who has omitted for several years to prove his debt in the regular way, is not a "person aggrieved," within the meaning of sect. 71 of the *Bankruptcy Act*, 1869, by the refusal to make an order the result of which, if made, would be to increase the assets available for the creditors, and is, therefore, not entitled to appeal from the refusal.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 13th of July, 1875, *W. Woods*, *E. G. Woods*, and *H. Woods*, who carried on a proprietary club, called the *City United Club*, at *Ludgate Circus*, in the City of *London*, were adjudicated bankrupts. On the 10th of September, 1875, Mr.

Explained Exparte Gilchrist 14 Ch D 58

A. G. Ditton, who claimed to be an equitable mortgagee by deposit of the lease of the bankrupt's premises with a memorandum of the 1st of April, 1875, charging the lease in his favour, filed a bill in the Court of Chancery against the trustee in the bankruptcy, praying for a declaration that the memorandum of the 1st of April constituted a good equitable security for the sum which he had advanced to the bankrupts, and for certain costs, and praying for a foreclosure or a sale of the property in default of payment. On the application of the trustee to the Court of Bankruptcy, Mr. Registrar *Hazlitt* granted an injunction restraining *Ditton* from proceeding with his suit, and ordered him to deliver up the lease to the trustee; that the trustee should be at liberty to proceed with a sale of the property which he had agreed to make, and to hand over the lease to the purchaser; and that, after the completion of the sale, the trustee should, out of the purchase-money, pay into Court £1270, the amount which *Ditton* claimed to be due on his security, to abide the result of any application to be made by him. *Ditton* appealed to the Court of Appeal, who discharged the Registrar's order, and ordered that, upon payment by the trustee into Court of £1270, *Ditton* should be restrained from taking any further proceeding in his suit, and that he should concur with the trustee in completing the sale of the leasehold premises, and should deliver the lease to the purchaser; and it was ordered that the £1270 should remain in Court to abide the result of any application which might be made by *Ditton* in respect of his alleged charge, and that an account should be taken of what was due on his security (1). The trustee did not pay the £1270 into Court in pursuance of this order. The contract for the sale of the lease had been entered into by the trustee on the 16th of August, 1875, with Messrs. *C. Moore & R. Delatorre*. It comprised, not only the lease, but also the goodwill of the bankrupts' business and their furniture, tenant's fixtures, and stock-in-trade. The purchase-money for the whole was to be £5000, in respect of which a deposit of £1000 was to be paid. The £1000 was paid to the trustee, and was employed in discharging arrears of rent due to the landlord, but the contract, so far as it related to the lease, was never completed, partly owing to the fact that the

(1) 1 Ch. D. 557.

C. A. 1879 *Ex parte* DITTON. *In re* WOODS.

trustee had not got possession of the lease, which was in the hands of *Ditton*. The other property comprised in the contract was, however, handed over to *Moore & Delatorre*, and was ultimately seized by the landlord under a distress for rent.

Moore & Delatorre, in November, 1876, filed a liquidation petition, and the balance of £4000 was never paid to the trustee. Some negotiations took place between the trustee and *Ditton*, and, on the 19th of April, 1876, the landlord served notice on the trustee to decide whether he would disclaim the lease. The trustee applied to the Court for leave to disclaim, and on the 25th of May, 1876, leave to disclaim was given to him by Mr. Registrar *Hazlitt*, *Ditton* being present when the order was made. On the 13th of June, 1876, the trustee executed a disclaimer, and notice of the disclaimer was served on *Ditton*. On the 15th of June *Ditton* gave notice of appeal from the Registrar's order. The appeal was dismissed (1).

On the 21st of June, 1878, the Comptroller in Bankruptcy reported to the Court that complaint had been made to him by and on behalf of creditors of the bankrupts with reference to the manner in which the trustee had dealt with the bankrupts' estate, and more particularly with reference to the contract with *Moore & Delatorre*, whereby the whole estate had been handed over to them for the most part on credit, the terms of which contract they had failed to carry out, thereby occasioning the loss of the entire estate to the creditors. The report went on to state that the Comptroller, in pursuance of the Statute and Rules, had inquired into the matters complained of, and that, as the result of his inquiries, it appeared to him that the terms of the contract with *Moore & Delatorre* were improvident, and that the estate of the bankrupts had suffered loss through the misfeasance, neglect, or omission of the trustee, as defined by sect. 57 of the *Bankruptcy Act*, 1869, and that such loss amounted to £4000, being the difference between £5000, the amount for which the estate was sold to *Moore & Delatorre*, and the £1000 actually paid by them. The Comptroller further stated that he had required the trustee to make good the loss to the estate, and that he had failed to comply with the requisition. The Comptroller therefore reported the

(1) 3 Ch. D. 459.

conduct of the trustee to the Court, and prayed the decision of the Court thereon.

The matter then came before the Registrar on a motion by the Comptroller that the trustee might be ordered to pay £4000 to the credit of the estate. The Registrar declined to make any order upon the motion, but he thought that the conduct of the trustee required investigation, and he refused to allow him any costs.

The Comptroller did not appeal from the decision, but an appeal was brought by *Ditton*, who in his notice of appeal described himself as "a creditor under the bankruptcy," and as "a person aggrieved by the order appealed from." He had not tendered any proof of debt in the bankruptcy proceedings. He had, however, made some affidavits, in which he said that he was entitled to an equitable charge upon the lease, and that £1270 was due to him on that security.

Sir *H. Jackson*, Q.C., and *Lumley Smith*, for the Appellant.

Winslow, Q.C., and *Bigham*, for the trustee, took the preliminary objection that the Appellant had no *locus standi*.

Sir *H. Jackson*, Q.C., and *Lumley Smith*, for the Appellant:—

The Appellant is a creditor, though he has not proved in the bankruptcy proceedings. He was a stranger to the bankruptcy, and was brought into it by the injunction which the trustee obtained, and since that his security has been destroyed by the act of the trustee in disclaiming. Sect. 71 gives him a right to appeal as a "person aggrieved" by the order: *Ex parte Ellis* (1); *Ex parte Learoyd* (2). The word "creditor" in the Act and Rules is not confined to a creditor who has proved. It is now the interest of the Appellant to prove, and therefore it is his interest that the assets should be as large as possible. At any rate, the hearing of the appeal ought to be adjourned, so as to give him an opportunity of proving.

Finlay Knight, for the Comptroller.

(1) 2 Ch. D. 797. (2) 10 Ch. D. 3.

C. A.
1879
Ex parte DITTON.
In re WOODS.

Winslow, Q.C., and *Bigham*, for the trustee:—

[JAMES, L.J.:—The only question is whether the Appellant should be now allowed an opportunity of electing whether he will prove.]

The proceedings have been going on ever since 1875. The disclaimer of the lease was in June, 1876. It is the Appellant's own fault that he has not proved before. Even if he had proved, we deny that he would have been entitled to appeal. If he tendered a proof, the trustee would then have an opportunity of adjudicating on his claim in the regular way. It may turn out that his claim is unfounded.

[They were stopped by the Court.]

JAMES, L.J.:—

There must be some limit to the right of appeal. A person who is substantially aggrieved by an order is entitled to appeal from it. The only ground for saying that the present Appellant is a person aggrieved by the order is that the estate of the bankrupts ought to have been increased by the sum of £4000, which the Comptroller ought to have obtained from the trustee. If he had obtained that sum, the estate would have been increased for the benefit of the creditors. The Appellant says, "I might have put myself in the position of a creditor by proving a debt, and I can do so." But, if he did tender a proof, the trustee might admit it, or he might reject it. The Appellant's only *locus standi* is that of a person who may tender a proof, upon which the trustee would then adjudicate, and who could appeal from the trustee's decision if he rejected the proof. I do not think that is such an interest as entitles him to bring the present appeal. The decision of this Court on the appeal from the order of the Registrar restraining the Appellant from proceeding with his foreclosure suit was not based on his being a person interested in the bankrupt's estate, but on the ground that he was insisting on a paramount right to the estate. We must treat that order as having been rightly made in the year 1876, and now we are in the year 1879. We are asked to give the Appellant further time to elect whether he will tender a proof for what it is worth. I think it is a great deal too late for him to

make such an application. There has never yet been a distinct affidavit by him that the bankrupts' estate is indebted to him. The matter has been in litigation ever since the year 1875, and he has never thought fit to take that step which alone could give him a *locus standi*, viz., proving that he is a creditor interested in swelling the amount of the assets. I am of opinion, therefore, that we cannot accede to his application.

BRETT, L.J.:—

It appears to me that we are not entitled to admit the appeal, unless the Appellant is a creditor of the bankrupts. He has not been recognised as such by any of the former orders of the Court. It is said that he has sworn that he is a creditor. If he has done so, I think that is not enough. The Act and the Rules have pointed out a particular mode in which a man is to prove that he is a creditor, and the Appellant has not followed that course.

COTTON, L.J.:—

I am of opinion that the Appellant cannot be heard on this appeal. It is said that he is entitled to appeal as being a "person aggrieved" within the meaning of sect. 71. That must mean aggrieved by the particular order appealed from. The order is one refusing to allow proceedings to be taken against the trustee to compel him to pay a sum of money to the estate. In my opinion a person aggrieved by such an order must be a person who is in a position to come in and claim a part of that sum if it were brought into the assets—that is, a creditor of the bankrupts; and the Appellant has not proved any debt or been recognised as a creditor by any order of the Court. But it is said that he was a secured creditor, and that his security has been destroyed by the act of the trustee. Assuming that he was a secured creditor, still he ought to have made up his mind within a reasonable time whether he would elect to come in and prove against the estate. There has been too long a delay on his part, and he ought not now, I think, to have any further opportunity given him of altering his course.

Appeal dismissed with costs.

C. A. 1879 *Ex parte* DITTON. *In re* WOODS.

Sir *H. Jackson* asked that the order to be made might express in terms the ground of the dismissal of the appeal.

THEIR LORDSHIPS assented.

Solicitor for Appellant: *A. G. Ditton.*
Solicitors for Trustee: *Pritchard, Englefield, & Co.*
Solicitor for Comptroller: *W. W. Aldridge.*

C. A. 1879 Feb. 20.

Ex parte CARR. *In re* HOFMANN.

Mortgagor and Mortgagee—Secured Creditor—Valuation of Security—Proof in Bankruptcy for Balance of Debt—Costs of Mortgagee's unsuccessful Defence of Title to Part of Mortgaged Property.

A bankrupt had, before his bankruptcy, obtained advances from a bank on the security of the deposit with them of the dock warrants of a quantity of tobacco, which he represented to be his own property. After the adjudication it was discovered that fifty bales of the tobacco did not belong to him, but that he had sold them and had received the purchase-money; the purchaser having left the dock warrants relating to them with him to enable him to clear them as the purchaser should require them. After the adjudication the purchaser of the fifty bales sued the bank, and recovered from them as damages the sum which he had paid for the fifty bales, together with his costs of the action, and the judgment was affirmed by the Court of Appeal. The bank afterwards tendered a proof in the bankruptcy for the balance of their debt beyond the value of their security:—

Held, that, in estimating that value, they were entitled to bring into account the costs (their own as well as the Plaintiff's) of the action, but not the costs of the appeal.

Ex parte Stephens (1) disapproved.

After the decision of the appeal, the bank sold the fifty bales for less than the purchaser had paid the bankrupt for them:—

Held, that, there being no evidence that this loss had arisen from any default on the part of the bank, they were entitled to bring that loss into account in estimating the value of their security.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

In January and February, 1876, the *Crédit Lyonnais*, a French bank, advanced to *J. A. Hofmann*, a merchant in *London*, sums amounting to £4000, on the security of the dock warrants for a

(1) 2 Mont. & A. 31.

number of bales of tobacco, which he represented to be his own property, the warrants being handed over to the bank. Soon afterwards, *Hofmann* absconded, and was, on the 21st of March, 1876, adjudicated a bankrupt. It was then discovered that a considerable part of the tobacco represented by the warrants pledged with the bank did not belong to the bankrupt, but was the property of other persons who had purchased it from him, and had left the warrants with him, in order that he might clear the tobacco for them as they required it. Fifty bales of the tobacco belonged to a Mr. *Johnson*, and fifty-four bales to other persons. An action was commenced against the bank by *Johnson* to recover damages for his fifty bales. The bank defended the action. It was tried before *Denman*, J., on the 13th of February, 1877, when judgment was given for the Plaintiff for £1256 18*s.* 8*d.* damages, and his costs (*vide Johnson* v. *Crédit Lyonnais* (1)). The bank appealed, but the decision was affirmed by the Court of Appeal on the 1st of December, 1877 (2). Actions had been commenced against the bank by the owners of the other fifty-four bales, but those actions stood over to await the decision in *Johnson's* action. After the decision of the Court of Appeal, the fifty-four bales were returned by the bank to their respective owners. The bank paid in addition to the £1256 18*s.* 8*d.*, costs amounting in the whole to £1089 10*s.* 11*d.* This sum included their own costs of defending the actions, as well as the costs of the several Plaintiffs, and of it £161 18*s.* 9*d.* represented the costs of the appeal. *Johnson's* fifty bales were sold by the bank in March, 1878, for £891 5*s.* 1*d.*, being less by £365 13*s.* 7*d.* than the amount of the damages which they had paid to him. The bank having sold a large part of the tobacco, and having put a value on that which remained unsold, claimed to prove in the bankruptcy for the balance which remained due to them upon their security. In estimating the balance, they claimed to deduct the £1089 10*s.* 11*d.* costs, and the £365 13*s.* 7*d.*, the loss on the sale of *Johnson's* tobacco, from the proceeds of the sale of their security, before giving the bankrupt's estate credit in respect of these proceeds. The trustee rejected the proof to the extent of those two sums.

The manager of the bank deposed that the fifty bales were

(1) 2 C. P. D. 224. (2) 3 C. P. D. 32.

C. A. 1879

Ex parte CARR. *In re* HOFMANN.

sold for the best price which could be obtained, and this was not contradicted.

There was no evidence that the value of the tobacco had diminished between the date of the judgment of *Denman*, J., and the sale of the fifty bales.

The Registrar held that both sums had been properly brought into account, with the exception of the £161 18*s.* 9*d.* for the costs of the appeal. The trustee appealed.

Winslow, Q.C., and *Lane*, for the Appellant:—

The costs of the action were incurred after the adjudication, and they could not, therefore, be directly proved in the bankruptcy. Nor can they be obtained indirectly by thus deducting them from the value of the security so as to increase the balance of the debt which is to be proved. It is well settled that interest for which a mortgagee cannot prove in bankruptcy cannot be taken into account in valuing his security for the purpose of estimating the amount for which he is entitled to prove: *In re Savin* (1).

The same principle applies to these costs. *Ex parte Stephens* (2) is directly in point. There, upon the petition of an equitable mortgagee for the sale of the mortgaged property, it was held that he could not be allowed out of the proceeds of sale the costs of successfully defending an extent in aid. It makes no difference whether the security is realized by the Court under rule 78, or by the mortgagee himself. Even, as between mortgagor and mortgagee, the mortgagee is not entitled to the costs of an unsuccessful attempt to defend the title to the mortgaged property: *Fisher* on Mortgages (3); *Dryden* v. *Frost* (4).

As to the loss on the sale of *Johnson's* tobacco, it has been caused by the bank's own delay. It is clear that the market was falling, and they ought to have sold sooner.

Cookson, Q.C., and *S. Woolf*, for the bank, were not heard.

JAMES, L.J.:—

I am of opinion that the order of the Registrar ought to be affirmed.

(1) Law Rep. 7 Ch. 760.
(2) 2 Mont. & A. 31.
(3) 3rd Ed. vol. ii. p. 1016, 1017.
(4) 3 My. & Cr. 670.

The *Crédit Lyonnais* were induced by *Hofmann* to accept a quantity of tobacco as security for an advance of money which they made to him, believing that he was, as he appeared to be, the owner of the tobacco. It turned out that he had sold some of the bales and that they belonged to *Johnson*, who had allowed *Hofmann* to continue in possession of them and to retain the *indicia* of title. *Johnson* sued the bank for damages in respect of his part of the pledged tobacco, and they defended the action, as they were lawfully entitled to do. They had obtained the goods honestly, and thought that they were entitled to hold them as against the man whose carelessness had created the difficulty. They defended the action unsuccessfully, and in so doing they incurred costs, and they were also compelled to pay the Plaintiff's costs. It is said that they are not entitled to deduct their costs from the value of their security, because they would not have been provable in the bankruptcy, and that there is an analogy to the rule that interest accrued due after an adjudication, which cannot be proved in the bankruptcy, cannot be brought into account by a mortgagee in estimating the amount of the balance for which he is entitled to prove after deducting the value of his security. I am of opinion that there is no such analogy. These costs are not, properly speaking, costs; they are expenses incurred by the owner of the security in respect of his security. It is as if a house subject to a mortgage had been destroyed by a fire, and the mortgagee had laid out £500 in rebuilding it, or as if a fire had diminished the value of the security. The costs are in fact deductions which are to be taken into account in estimating the value of the security. The only question is whether the costs were reasonably and properly incurred. The Registrar thought that it was a reasonable thing for the bank to defend the action, but that, when the judgment went against them, it was not reasonable for them to appeal. I think the Registrar was right, and I concur in his conclusion that the costs of the action should be deducted from the value of the bank's security. It is said that this conclusion is adverse to the decision in *Ex parte Stephens* (1), but the report of that case is contained in a very few lines; no facts are stated, and no argument, and no reasons are given for the judgment. It cannot, there-

(1) 2 Mont. & A. 31.

C. A. 1879 *Ex parte* CARR. *In re* HOFMANN.

fore, have any weight as an authority. If necessary, I am prepared to say that I cannot follow it, for I cannot understand the principle on which it is founded. A mortgagee is entitled to deduct from the value of his security that which is in the nature of salvage money, his reasonable expenses of defending his title.

Then, again, it is said that the bank are not entitled to charge the deficiency of the proceeds of the sale of *Johnson's* tobacco as compared with the damages which they had to pay to him. I think the Registrar was right on this point also. Mr. Justice *Denman* gave *Johnson*, as damages, the price which he had paid for the tobacco. There was a diminution in its value on the sale by the bank, but in what interval of time the loss occurred there is no evidence. The bank were under no obligation to sell before the bankruptcy, nor before their rights were ascertained in the action, which was not until February, 1877, and they sold in March, 1878. There is nothing to shew that there was any further fall in the price of tobacco in the market in that period of time. That being so, we have no materials on which we can differ from the Registrar's conclusion, that the loss incurred on the sale was not owing to any neglect on the part of the bank.

BRETT, L.J.:—

The bankrupt *Hofmann* pledged a quantity of tobacco with the bank, representing to them that he had a right to pledge it. After the bankruptcy, *Johnson* claimed part of it. The bank, acting on the faith of what *Hofmann* had told them, defended their security. The mere fact of their defending the action would not give them the right to charge the costs of it against their security. But I agree with the Registrar that the defence was a reasonable one. It is said that as the costs were incurred after the adjudication they could not be proved in the bankruptcy, and therefore it is said that they cannot be deducted from the value of the security. The result would be that the bank could not recover these costs from anybody. If equity permitted such an iniquity as this I should be ashamed of it. *Ex parte Stephens* (1) is the only authority cited. But no decided case can be an authority unless one can tell what is the principle upon which the judgment was

(1) 2 Mont. & A. 31.

founded, and I defy any man to say what is the principle of the judgment in *Ex parte Stephens* (1). As to the deficiency on the sale of *Johnson's* tobacco, the only question is, whether the bank held that tobacco for more than a reasonable time, and I agree with the Registrar that they did not.

COTTON, L.J.:—

No doubt the result of the Registrar's decision is to allow a larger amount of proof against the bankrupt's estate than if the appeal were successful. Therefore it is said that the case ought to be dealt with as if it were a question of the amount of proof. But I think the question is this, how are the net proceeds of the security to be ascertained? And, when you have ascertained those proceeds, you must of course ascertain the amount of debt provable, or otherwise you cannot ascertain the balance of the debt beyond the proceeds of the security. The costs in question were expenses incurred by the bank in defending their title to goods which the bankrupt had claimed the right to dispose of. In my opinion those costs ought, whether they were incurred before or after the bankruptcy, to be allowed to the bank as mortgagees, because they were expenses incurred by them in defending their title to goods on the credit of which they had advanced their money. Can the trustee in the bankruptcy stand in any better position than the bankrupt? In my opinion he cannot. A mortgagee has a right to assume his mortgagor's representation of his title to be true, and to take any reasonable proceedings for defending his title and asserting the validity of his security. It is said that *In re Savin* (2) is adverse to our conclusion. But that was an entirely different case; the question there was as to the amount of provable debt. The only other authority cited was *Ex parte Stephens.* I can really add nothing to what has been said about that case; neither the facts nor the reasons for the decision are shewn by the report, and it is impossible, therefore, to take it as a guide. The other question is this, Have the bank acted reasonably in realizing their security? There is nothing to shew that they have not, and the Registrar has decided that they

(1) 2 Mont. & A. 31. (2) Law Rep. 7 Ch. 760.

C. A. 1879 *Ex parte* CARR. *In re* HOFMANN.

did the best they could with it. I am of opinion that there is no reason either on principle or authority for disturbing his decision.

Appeal dismissed with costs.

Solicitors for Trustee: *Linklater, Hackwood, & Co.*
Solicitors for Bank: *M. Abrahams & Roffey.*

C. A. 1879 Feb. 20.

Ex parte COOPER. *In re* McLAREN.

Vendor and Purchaser—Stoppage in Transitu—End of Transitus—Alteration of Relation between Carrier and Consignee—Constructive Delivery—Delivery of Part of Cargo—Lien of Ship's Master for unpaid Freight—Common Partner in Firms of Vendor and Purchaser.

13 Ch D 632
14 Ch D 453

A cargo of 114 tons of miscellaneous iron castings was consigned from *Scotland* to *London* on board a ship chartered by the vendor, the bill of lading being made out in favour of the purchaser or his assigns, he or they paying freight. After thirty tons of the cargo had been delivered to the purchaser the vendor gave notice to stop the unloading of the ship. At this time only part of the freight had been paid to the master of the ship. Soon afterwards the purchaser filed a liquidation petition, and a receiver was appointed. The balance of the freight was paid by the receiver, and the remainder of the iron was placed *in medio*:—

Held, that, inasmuch as it could not be supposed that the master intended to abandon his lien for the unpaid freight, the delivery of the thirty tons did not operate as a constructive delivery of the whole cargo, and that, consequently, the *transitus* was not at an end as to the remainder of the cargo, and the vendor's notice to stop *in transitu* was given in time.

In the absence of evidence to the contrary, it must, as a general rule, be assumed that the delivery of part of a cargo is intended only to operate as a delivery of that part.

But, if the cargo consisted of the different parts of one entire machine,

Semble, that the delivery of an essential part of the machine would operate as a delivery of the whole.

Slubey v. *Heyward* (1), *Hammond* v. *Anderson* (2), and *Jones* v. *Jones* (3) distinguished.

When goods are placed in the possession of a carrier to be carried for the vendor and to be delivered to the purchaser, the transit is not at an end so long as the carrier holds the goods as carrier, nor until by agreement

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(1) 2 H. Bl. 504. (2) 1 B. & P. (N.R.) 69.
(3) 8 M. & W. 431.

between him and the purchaser he holds them, not as carrier, but as the purchaser's agent.

The purchaser was also a partner in the vendor's firm:—

Held, that this did not affect the right of the vendor to stop *in transitu*.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

Andrew McLaren carried on business in *London* alone, as an iron merchant, under the firm of *Andrew McLaren & Co.* He also carried on business at *Alloa*, in *Scotland*, as an ironfounder, in partnership with *Richard Andrews*, under the firm of the *Albion Iron Company*. *Andrews* took no active part in the management of the business, being only a sleeping partner.

On the 30th of July, 1878, 114 tons of iron goods, described as light castings, were shipped by the Scotch firm at *Alloa* on board a ship called the *Shamrock*, chartered by them but belonging to some shipowners at *Glasgow*, consigned to the *London* firm. The bill of lading was for delivery of the goods to *A. McLaren & Co.*, or their assigns, "he or they paying freight." The invoices were headed

"Messrs. *A. McLaren & Co.*
"Bought of
"*Albion Iron Company.*"

The goods were of a miscellaneous description, comprising parts of stoves, ovens, boilers, cisterns, troughs, lamp-posts, pipes, gutters, &c. £20 on account of the freight (which was at the rate of 10*s.* per ton) was paid to the captain of the ship on the 30th of July by the Scotch firm on account of the *London* firm. On the 7th of August the ship arrived in the port of *London*, and on the same day thirty tons of the goods were placed on board a barge belonging to the *London* firm. On that day also a further sum of £5 was paid by the *London* firm on account of the freight. On the 8th of August *McLaren*, who was then in *Scotland*, and who had become aware that both the firms were in an insolvent condition, sent the following telegram to the manager of the *London* firm:—

"If commenced to unload ship, stop proceedings; if not, do not begin until I return."

C. A. 1879 *Ex parte* COOPER. *In re* MCLAREN.

The telegram was received the same day, and the unloading of the cargo was stopped. On the 12th of August *McLaren*, who had returned to *London*, saw the captain of the ship, and told him not to do anything more with the unloading, and accordingly no more of the cargo was unloaded. On the 15th of August a further sum of £15 was paid on account of the freight. On the 19th of August *McLaren* filed a liquidation petition in the *London* Bankruptcy Court, and a receiver of his property was appointed. On the 23rd of August the receiver paid the balance of the freight. A trustee was afterwards appointed and the goods were landed, but were kept by arrangement distinct from the other property of *McLaren*. On the 21st of September the Scotch firm presented a petition for sequestration in the Scotch Court, under which a trustee of their property was appointed on the 2nd of October. The goods shipped by the *Shamrock*, which had not been paid for, were claimed by both trustees. There was evidence that the Scotch firm was indebted to the English firm to the amount of £9000 in respect of acceptances of the English firm given for their accommodation. The Registrar held that the Scotch trustee was entitled to the goods. The English trustee appealed. Before the appeal came on for hearing the Scotch trustee gave notice that he abandoned his claim to the thirty tons which were unloaded on the 7th of August.

Joseph Brown, Q.C., and *Stern*, for the Appellant:—

The Registrar has treated the case as one of stoppage *in transitu*; perhaps it would be more properly regarded as a case of an insolvent purchaser refusing to receive goods which he knows that he cannot pay for. If it was intended to stop *in transitu*, the notice ought to have been given to the master of the ship, not, as it was, to *McLaren's* own manager. Moreover, the Scotch firm was indebted to the *London* firm to the extent of £9000 in respect of acceptances for their accommodation.

But, whichever is the right view of the case, the notice to stop the delivery came too late; the delivery of the thirty tons on the 7th of August operated as a constructive delivery of the whole cargo: *Slubey* v. *Heyward* (1); *Hammond* v. *Anderson* (2); *Ben-*

(1) 2 H. Bl. 504. (2) 1 B. & P. (N.R.) 69.

jamin on Sales (1). It is a question of the intention of the purchaser: *Smith's* Leading Cases (2); *Hanson* v. *Meyer* (3); *Tanner* v. *Scovell* (4); but that must mean the intention at the time when the partial delivery takes place. If it is not shewn that there was an intention to separate the part which is delivered from the rest of the cargo, it must be assumed that the delivery of the part was intended to operate as a delivery of the whole.

[COTTON, L.J., referred to *Jones* v. *Jones* (5).]

In all the cases in which a delivery of part has been held not to amount to a constructive delivery of the whole there had been a subsale by the original purchaser: *Dixon* v. *Yates* (6); *Simmons* v. *Swift* (7); *Miles* v. *Gorton* (8).

Before the telegram arrived the payments on account of freight considerably exceeded the proportion of freight attributable to the thirty tons which had been delivered.

[BRETT, L.J.:—If the whole had been delivered to the vendee the master's lien for unpaid freight would have been gone.]

Bolton v. *Lancashire and Yorkshire Railway Company* (9) differs from the present case, because there was not one entire cargo commencing the transit at one time.

Again, *McLaren* had no right to stop *in transitu*, because by so doing he was in effect making a fraudulent preference in favour of the Scotch firm.

[They also referred to *Allan* v. *Gripper* (10) and *Crawshay* v. *Eades* (11).]

Benjamin, Q.C., and *R. T. Reid*, for the Scotch trustee, were not heard.

JAMES, L.J.:—

I think that the decision of the learned Registrar ought to be affirmed. I do not know that it is necessary for us to lay down any

(1) 2nd Ed. pp. 663 *et seq.*
(2) 7th Ed. vol. i. p. 822.
(3) 6 East, 614.
(4) 14 M. & W. 28.
(5) 8 M. & W. 431.
(6) 5 B. & Ad. 313.
(7) 5 B. & C. 857.
(8) 2 C. & M. 504.
(9) Law Rep. 1 C. P. 431.
(10) 2 C. & J. 218.
(11) 1 B. & C. 181.

C. A. 1879 *Ex parte* COOPER. *In re* MCLAREN.

general principle with regard to the cases of *Slubey* v. *Heyward* (1) and *Hammond* v. *Anderson* (2), under what circumstances a delivery of part of a cargo is to be considered as a delivery of the whole, so as to put an end to the vendor's right of stoppage *in transitu*. It is suggested that if a vendor receives notice of the purchaser's insolvency, and at once takes steps, comes up in a train as fast as he can, and then finds that the captain has delivered a single bale of the goods, he has then no right to stop *in transitu*. No such case as that, so far as I know, has ever occurred. In the cases which have occurred there has been some change in the relationship between the carrier or the warehouseman and the vendee, such a change as to make the carrier or the warehouseman the holder of the goods as agent for the vendee.

In *Bolton* v. *Lancashire and Yorkshire Railway Company* (3), Mr. Justice *Willes* says (4): "Then as to the alleged delivery of part of the goods, and the effect of that upon the vendor's right to stop the rest. There have been different expressions of opinion at various times as to whether the delivery of a portion of the goods, the subject of an entire contract, operates as a constructive delivery of the whole, so as to put an end to the right of stopping *in transitu*. It was supposed to have been thrown out by *Taunton*, J., that a delivery of part operated as a constructive delivery of the whole, but that doctrine has since been called in question and dissented from, and it is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole." Now in the present case it seems to me quite clear there was nothing like a constructive delivery of the whole by the captain, or a constructive acceptance of the whole by the vendee. How it might have been if the whole freight had been paid, so that the captain had no lien that he could exercise on behalf of the owners of the ship, and the delivery had begun, what difference that would have made it is not necessary now to say. It appears to me quite clear that, as there was not an actual delivery of the whole, there could not be

(1) 2 H. Bl. 504.
(2) 1 B. & P. (N.R.) 69.
(3) Law Rep. 1 C. P. 431.
(4) Ibid. 440.

a constructive delivery of the whole, because it must be assumed that the captain would not have delivered the whole until he had received the whole of the freight; and if the captain had not constructively delivered the whole, it would be impossible to say that the vendee had constructively accepted a delivery which was never made. I am of opinion, therefore, that there was not such a constructive delivery by the captain, or such a constructive acceptance of that delivery by the vendee as would amount to an acceptance of the whole—that is to say, such an acceptance as would prevent the vendee from refusing to take, or the vendor from exercising his right of stoppage *in transitu*, the vendee having become insolvent. I do not think that it makes any difference that one of the partners in the one firm himself constituted the other firm.

BRETT, L.J.:—

I am of opinion that there was a valid stoppage *in transitu* by the vendors at the time when *McLaren* directed the captain to stop the delivery. In my opinion the goods were then in the hands of the shipowner as carrier, and the *transitus* was not at an end. The only ground upon which it is urged that the *transitus* was then at an end is that there had been a delivery of part of the cargo. It seems to me, however, that a delivery of part, or even of the bulk of a cargo, is not *primâ facie* a delivery of the whole; and that those who rely upon the part delivery as a constructive delivery of the whole are bound to shew that the part delivery took place under such circumstances as to make it a constructive delivery of the whole.

Now it is objected first that *McLaren*, as a member of the *London* firm, was doing wrong in stopping the delivery so as to give the Scotch firm an opportunity of stopping *in transitu*—that he was thereby making a fraudulent preference in favour of the Scotch firm. But it was admitted by Mr. *Brown* that that depended upon whether the *transitus* was then at an end—whether the delivery was in law complete. Therefore, unless the delivery was complete, there was nothing wrong in *McLaren* (knowing that his *London* firm was insolvent) stopping the delivery so as to give the Scotch firm the opportunity of exercising their rights as unpaid vendors. The Scotch firm had, under the circumstances,

C. A. 1879 *Ex parte* COOPER. *In re* MCLAREN.

the right to stop *in transitu*, unless the *transitus* was over. We are driven, therefore, to the only point in the case, that is, whether the *transitus* was over. Now the goods were shipped by the Scotch firm; they were placed on board the ship to be carried to *London*, and there delivered to the purchaser. At the time, therefore, of the delivery on board the goods were held by the captain as a carrier on behalf of the Scotch firm. They were brought to *London*, and there was a part delivery. There had been some freight paid, and, to my mind, the captain was bound to deliver, unless ordered to the contrary, up to the extent of the freight which had been paid; but the moment he had delivered sufficient to satisfy that, he had his lien upon the whole of the remainder of the cargo for the unpaid balance of the freight. Then the captain, holding the goods as carrier, delivers a part. Can it be properly said that when he did so he intended to deliver the whole? If he did, he intended to give up his lien for the unpaid freight. The inference is directly the contrary. He could not have intended to give up his lien, and therefore, when he delivered part, he did not intend to deliver the whole; on the contrary, he intended to keep back the remainder, or part of it, in order to secure his lien for the freight. In the same way it seems to me that, from the mere fact of *McLaren's* servant having received a part, he knowing that he could not receive the rest without paying the freight, and there being no evidence that he tendered the freight for the rest, it cannot be inferred that he intended to take the delivery of part as the delivery of the whole. It is the mere ordinary case of taking the delivery of a whole cargo in consecutive partial deliveries. If that be so, the captain holds the undelivered part as a carrier, and the *transitus* is not over. If that be so, the Scotch firm were entitled to stop *in transitu*. With regard to the cases of *Slubey* v. *Heyward* (1) and *Hammond* v. *Anderson* (2), it seems to me that in the former case the ground of decision was that the captain of the ship had altered his position from that of a mere carrier, and had undertaken, with the consent of the assignees of the bill of lading, to hold the whole of the cargo for them; and in the latter case the wharfinger, who for a time had held for the persons who had put the goods into his

(1) 2 H. Bl. 504. (2) 1 B. & P. (N.R.) 69.

hands, had altered his position, and, with the consent of the person to whom the goods were transferred, had agreed to hold them, no longer for the person who had put them into his hands, but for the vendee. In both cases there was an attornment by the person who held the goods, and unless something equivalent to an attornment is shewn on the part of the carrier, so that he has altered his position from that of carrier, and holds them in another capacity, it seems to me the *transitus* cannot be at an end. So long as the carrier holds the goods as carrier, the mere fact of a delivery of part to the purchaser does not prevent the unpaid vendor from stopping the remainder *in transitu*. It seems to me that any other doctrine would be of the greatest possible danger in mercantile transactions. I may say that I think this case goes even further than a mere stoppage *in transitu*, because to my mind the agreement of the vendors and the vendee, both of whom were *sui juris*, intended a cessation of the delivery of the goods.

COTTON, L.J.:—

Whether this case is one of stoppage *in transitu* or of refusal by the vendee to accept delivery of the whole, the only question is this, whether there had been a constructive delivery of the whole to *McLaren* in *London*, that is to say, whether he had constructive possession of that portion of the cargo which in fact remained in the ship.

In my opinion, there is no ground for contending that from the very first the captain was the agent of the *London* firm, *i.e.*, that when the goods were put on board the ship they became in the possession of the *London* firm. That being so, those goods which actually remained on board the ship were in the possession of the person who had to carry them and to deliver them to *McLaren* in *London*. Was there such a delivery? Actually there was not. But it is said that there was a constructive delivery, and therefore a constructive possession of them by *McLaren*. Why? Because there was an actual delivery to him in *London* of portions of the cargo. The case might possibly be different if the whole of the cargo had been one entire machine, because if a person was allowed to take possession of one piece of a machine that might amount to possession of the whole. It might possibly

C. A. 1879 *Ex parte* COOPER. *In re* MCLAREN.

be (I do not decide it, and it would stand in a very different position from the present case) that the purchaser would have got possession of the entirety, of which he had taken away an essential part. But here we have a cargo consisting of a number of different things capable of being estimated separately as to their value, and in fact estimated in the bill of lading by the particular value of each. Does a delivery of a portion of those articles, which are in their nature entirely separate one from the other, constitute a constructive delivery of the whole? In my opinion, on principle it does not. It is only a delivery of that which is actually put over the ship's side and into the hands of the consignee. The captain has a lien for his freight on the remainder, having in no way given it up. But it is said that the authorities are against this conclusion. Certainly no case has been cited which decides the present case in favour of the Appellant. *Tanner* v. *Scovell* (1) was said to be in his favour. But it was really only a decision that, where a consignee took part, intending to deal with it in separation from the rest of the cargo, under those circumstances the taking of part was not a taking of the whole. But Mr. *Brown*, I think, argued, if not in words, yet in substance, that where there is no evidence to the contrary it must be presumed that the taking of a part is a taking of the whole. In my opinion that is wrong in principle. But has it been so decided? In *Tanner* v. *Scovell*, *Pollock*, L.C.B., who delivered the judgment of the Court, says this (2): "It will be found that the only two cases, so far as I have looked at them, which bear the semblance of an authority that a mere part delivery is sufficient to put an end to the right to stoppage *in transitu*, are these: *Slubey* v. *Heyward* (3) and *Hammond* v. *Anderson* (4). In the case of *Bunney* v. *Poyntz* (5), part delivery of a portion of a haystack, with intent to separate that from the remainder, was held not to be sufficient. In *Jones* v. *Jones* (6), on the other hand, this Court held, that the vendee (who was assignee under a trust deed) took possession of part of the cargo with the intention of obtaining possession of the whole for the purposes of the trust, and therefore that such taking

(1) 14 M. & W. 28.
(2) Ibid. 37.
(3) 2 H. Bl. 504.
(4) 1 B. & P. (N.R.) 69.
(5) 4 B. & Ad. 568.
(6) 8 M. & W. 431.

possession of part did put an end to the transit; but it was fully admitted in that case that the mere delivery of part to the vendee, when he meant to separate that part from the remainder, did not put an end to the right to stop *in transitu* . . . . If the vendee takes possession of part, not meaning thereby to take possession of the whole, but to separate that part, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part and no more; the right of lien and the right of stoppage *in transitu* on the remainder still continue."

The judgment in *Slubey* v. *Heyward* (1) does not say on what ground the case was decided, other than the special circumstances of the case. In *Hammond* v. *Anderson* (2), as has been already pointed out, there had been an actual weighing by the purchaser of the entirety of the cargo. How can a man weigh a thing that is not in his possession? That prevents any general proposition in favour of the Appellant being drawn from those two cases. Then as to the case of *Jones* v. *Jones* (3). It looks at first a little more like one which supports the general proposition which is put forward. But when it is examined it amounts only to this, that the Court came to the conclusion as a matter of fact that there was an intention to take the whole when part only was actually taken; and, that being so, it is only an authority that where a purchaser taking part shews an intention, acquiesced in by the carrier, to receive and take possession of the whole, that is a constructive possession of the whole by the acquiescence of both parties. It does not in any way support the proposition that the mere delivery of a part of the cargo, as in the present case, can be looked upon as a constructive delivery of the whole, or as putting the consignee in constructive possession of the whole so as to defeat the vendor's right to stop *in transitu*, or the right of the consignee, if he so desires under the circumstances, to put an end to the contract.

JAMES, L.J.:—

Having now had the advantage of hearing the judgments of my learned brothers, I think that our decision, in which we are unani-

(1) 2 H. Bl. 504. (2) 1 B. & P. (N.R.) 69.
(3) 8 M. & W. 431.

C. A. 1879 *Ex parte* COOPER. *In re* MCLAREN.

mous, may be expressed thus. When goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent. Of course the same principle will apply to a warehouseman or a wharfinger.

Solicitors for English Trustee: *Linklater, Hackwood, & Co.*
Solicitors for Scotch Trustee: *West, King, & Co.*

C. A. 1879 *Jan.* 31.

GILBERT *v.* SMITH.

[1876 G. 18.]

Partition Act (31 & 32 *Vict. c.* 40), *ss.* 3, 4, 5—*Some Parties desiring a Sale—Offer by others to purchase.*

The 3rd section of the *Partition Act* is not controlled by the 5th section.

In a partition suit the Plaintiffs, who were entitled to three-sixteenth shares of the property, desired a sale; the Defendants, who were entitled to the remaining thirteen-sixteenths, objected to a sale, but offered to take the Plaintiffs' shares at a valuation under the 5th section of the Act.

The number of parties interested and the nature of the property were such that the Court was of opinion that a sale would be beneficial to all parties:—

Held (reversing the decision of *Malins*, V.C.), that, the conditions of the 3rd section being fulfilled, a sale ought to be directed, with liberty to all parties, other than those having the conduct of the sale, to bid.

Affirmed by H. of L. 5 App. Cas. 65.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

The action was brought for a partition, and at the original hearing the usual reference was made to Chambers to ascertain the interests of the various parties in the property sought to be partitioned. The result of the inquiries was to this effect—that the Chief Clerk had divided the interests of the parties into 336 shares, of which the Plaintiffs *Thomas W. Jones* and *George Biron*, as trustees of a settlement dated in January, 1871, and the Plaintiff

(1) 8 Ch. D. 548.

George Heaton, as mortgagee, were entitled to forty-two shares, *William Pitt* to fifty-nine shares, *William Pitt* and *Peter Pitt*, his mortgagee, to twenty-five shares, the said *Peter Pitt* to thirty-five shares, *Peter Pitt* and *Joseph Ballard Pitt*, as trustees of a settlement dated in July, 1868, to thirty-five shares, *Joseph B. Pitt* to fifty-six shares, the Defendants *Mary Smith* and *T. Drinkworth* to sixty-three shares, and *H. Sutor* and *Emma* his wife to the remaining twenty-one shares.

It was admitted on both sides that practically the shares might be divided into sixteenths, and that the Plaintiffs and others in the same interest were entitled among them to three-sixteenths, while the Defendants were entitled between them to thirteen-sixteenths of the entirety. The property consisted of three houses, divided into five tenements, and was situate in the centre of the town of *Birmingham*, where improvements were going on which, it was alleged, would greatly increase the value of the property.

The Plaintiffs and others being owners of three-sixteenths were desirous of having a sale of the property in order that they might receive immediate payment of their shares, while the Defendants, the owners of thirteen-sixteenths, were desirous of retaining their shares, and were willing to purchase the shares of the Plaintiffs and others at a valuation.

The Vice-Chancellor held that the case came within the 5th section of the *Partition Act* (31 & 32 Vict. c. 40), which gives power to the Court, in case one of the parties undertakes to purchase the shares of the party desiring a sale, to order a valuation of that share, and to give proper consequential directions; and his Lordship accordingly directed a valuation of the three-sixteenth shares and a sale of them to the Defendants. From this decision the Plaintiffs appealed.

Bristowe, Q.C., and *Lewin*, for the Plaintiffs:—

The Vice-Chancellor was of opinion that, considering the number of parties and the nature of the property, this was a case in which a sale was desirable rather than a partition; therefore the case comes within the 3rd section of the *Partition Act*, and we, who desire a sale, have a right to the benefit of that section. The 5th section does not apply to a case which is within the 3rd section, nor to one which is within the 4th section, but to one where there

C. A. 1879 GILBERT v. SMITH.

would otherwise have been a partition; and in such a case the Court may allow one party to take another party's share at a valuation. But where a case for a sale is established there is nothing in the Act to compel a party to sell his share to another party: *Williams* v. *Games* (1); *Drinkwater* v. *Ratcliffe* (2). We object to a close sale of our shares to one of the parties interested; if we cannot have an open sale of the whole property, we will withdraw our request for a sale and ask for a partition.

Davenport, for other parties in the same interest.

J. Pearson, Q.C., and *Bardswell*, for some of the Defendants:—

We ask neither for a sale nor a partition, but we ask that if there is a sale we should be allowed to purchase the shares of the Plaintiffs at a valuation. The Court has power to order this under the 5th section. When the majority desire a sale it is compulsory on the Court, under the 4th section, to order one. But the 3rd section is discretionary, and does not grant a right of insisting on a sale to any of the parties. The 5th section is quite independent of the 3rd, and applies to a different state of things, namely, where the minority desires a sale and the majority are willing to purchase their shares at a valuation. The Vice-Chancellor's order was applicable to the present case, and the best order to make under the circumstances.

Glasse, Q.C., and *Woodroffe*, for other Defendants.

JESSEL, M.R.:—

I do not wish to repeat what I have already said in *Drinkwater* v. *Ratcliffe* (3), except that I take the same view of the law now, sitting here, as I did then; it being, to my mind at all events, clear that the 5th section of the *Partition Act*, 1868, does not apply where the 3rd section does.

The question is whether the Appellants in this case are within the 3rd section. Now the real point that the Court has to consider is whether, under the circumstances I am about to mention, it would be more beneficial for the parties interested to have a sale

(1) Law Rep. 10 Ch. 204. (2) Law Rep. 20 Eq. 528.
(3) Law Rep. 20 Eq. 530.

than a partition. The circumstances to which the attention of the Court is specially directed by the Act are, amongst others, two; one, the nature of the property, the other the number of the parties interested. As regards the number of the parties interested in this case, they are very numerous, and their shares are very curious fractions. The utmost that can be said on that question in favour of the Respondents is this: they say that by arrangement between themselves they can reduce the number of the parties to four. I am not satisfied that they can. It appears to me from the certificates that some of the Respondents are trustees, but I will assume in their favour that they can to that extent reduce the number of the parties. Then there are four parties with these very odd fractions: about two-sixteenths—it is not exactly that—for the Plaintiffs, one-sixteenth for Mr. *Davenport's* clients, three-sixteenths for Mr. *Glasse's* clients, and then there would be ten-sixteenths, or thereabouts, for the Respondents. The property in question consists of three houses somewhere near the centre of the town of *Birmingham*. The three houses are divided into five tenements. How they are to be divided by partition in any rational way, I myself do not understand, nor has anybody suggested that they can be. Of course you can always divide a house in the way one was divided in a well-known old case, by giving one part of the house to one man, and another part to another man; and then you might have such a complaint as was made there, that the partitioner did not give one of them any staircase, so that he could not get to the top, and the short answer was that he could not divide it in any other way if he made the shares of anything like equal value. That is all irrational. The meaning of the Legislature was that when you see that the property is of such a character that it cannot be reasonably partitioned, then you are to take it as more beneficial to sell it and divide the money amongst the parties. It does appear to me that, looking at the nature of the property, and to the fractions into which it must be divided, it is in this case beneficial for all the parties interested that there should be a sale and not a partition, and therefore I think that the Appellants are entitled to what they ask, namely, to discharge the Vice-Chancellor's order and to direct a sale. Of course when the case comes

C. A. 1879 GILBERT v. SMITH.

into Chambers the Court has full power to give directions as to the mode of sale, and it can give the Respondents, as I understand they now desire, liberty to bid at the sale, or liberty to lay proposals before the Judge in Chambers as to buying the property. In either way they may secure the property to themselves if they are willing to give the full value; and that is all, as I understand, that the Appellants ask for.

JAMES and BRAMWELL, L.JJ., concurred.

Order for sale accordingly, with liberty to all parties, other than the parties having the conduct of the sale, to bid and to carry in any proposals before the Judge in Chambers.

Solicitors for Appellants: *Whately, Milward, & Whitehead.*
Solicitors for Respondents: *Gamlen & Son; Letts & Son; Robinson & Preston.*

C. A. 1879 Feb. 28.

CHILD *v.* STENNING.

[1870 C. 227.]

Measure of Damages—Covenant for Quiet Enjoyment—Breach by Lessor—Costs of defending Action by rightful Claimant.

17 Ch D 179

The Plaintiff, a lessee of land, brought an action against the lessor and against other lessees who claimed a right of way over the Plaintiff's land under a grant from the same lessor, denying the right and claiming an injunction against the lessees; or, if the Court should hold that they had a right of way, then damages from the lessor under his covenant for quiet enjoyment.

At the trial the other lessees established their right of way, and judgment was given against the lessor for damages for the loss sustained by the Plaintiff by reason of the exercise of the right of way:—

Held, that the measure of damages payable by the lessor was not the permanent injury to the land, but only the damage sustained at the commencement of the action:

But *held*, also, that the lessor, being the cause of the whole litigation, must pay the costs of the Plaintiff and the other lessees.

The judgment of *Fry*, J., varied.

THIS was an appeal from a decision of Mr. Justice *Fry* (1).

The facts were shortly as follows:—

(1) 7 Ch. D. 413.

Sa SC 5 Ch D. 695.

The Rev. *A. Wagner*, by an agreement made in December, 1865, agreed to grant to *J.* and *A. Stenning* a lease for ninety-nine years of certain land at *Brighton*.

On the 24th of August, 1876, Mr. *Wagner* demised a piece of land adjoining the land so demised to *J.* and *A. Stenning* to the Plaintiff, *S. Child*, and entered into the usual covenants, including a covenant for quiet enjoyment.

J. and *A. Stenning* claimed, under their agreement, a right of way over the piece of land demised to *Child*, and *Child* brought this action against Mr. *Wagner* and *J.* and *A. Stenning*, claiming damages for trespass and an injunction against *J.* and *A. Stenning*; and in the alternative, if the Court should be of opinion that the *Stennings* were entitled to a right of way, then for damages against Mr. *Wagner* for breach of their covenant for quiet enjoyment.

At the trial of the action Mr. Justice *Fry* gave judgment for the *Stennings*, with costs, being of opinion that they had established their right of way over the Plaintiff's land; and he also gave judgment against the Defendant *Wagner* to indemnify the Plaintiff against the injury he had received from the *Stennings*. His Lordship assessed the damages sustained by the Plaintiff at £400, and ordered the Defendant *Wagner* to pay the Plaintiff's costs, but not to pay the costs which the Plaintiff had to pay to the *Stennings*.

The amount of damages awarded to the Plaintiff against the Defendant *Wagner* was based upon the evidence of a surveyor, who gave that sum as his estimate of the permanent injury to the Plaintiff's land by its being subject to the right of way claimed by the *Stennings*.

It appeared from the evidence that Mr. *Wagner* had throughout denied the right of the *Stennings*, and had encouraged the Plaintiff to resist them.

From the judgment, so far as related to the amount of damages, the Defendant *Wagner* appealed.

Kekewich, Q.C., and *Fellows*, for the Appellant:—

The measure of damages taken by the Judge was erroneous.

C. A. 1879 CHILD v. STENNING.

He has taken it as the permanent injury to the land, in the same way as if the Plaintiff had been entirely evicted from the piece of land covered by the right of way, whereas the Plaintiff is only entitled to damages for the injury he had sustained up to the time of bringing the action from the exercise of the right of way. If that action had been for breach of a covenant for the title, it might have been different, but this is for breach of a covenant for quiet enjoyment, and there is nothing to shew that the Plaintiff will be injured by any further exercise of the right of way, or if so, to what extent. If he should be, he can bring a fresh action: *Bowes* v. *Law* (1); *Howell* v. *Richards* (2); *Dennett* v. *Atherton* (3). There is no evidence of any substantial injury sustained, and the Plaintiff is only entitled to nominal damages to establish his right.

Morshead (*Cookson*, Q.C., with him), for the Plaintiff:—

The measure of damages adopted by the Judge was the right one. The piece of land over which the right of way extends is used as a building-yard, and the right of way materially injures its use for that purpose. Although the covenant is merely for quiet enjoyment, the Court ought to give damages for the permanent injury, and not put the Plaintiff to the necessity of bringing successive actions. The proper measure of damages is the difference between the state of things as it is now and as it would have been if the right of way had not been established: *Wall* v. *City of London Real Property Company* (4). But if the Court should be of opinion that the judgment was erroneous as to the measure of damages, we ask to have the judgment varied as to the costs of the suit. The Judge made the Plaintiff pay the costs of the *Stennings*, of which we do not complain; but he would not allow the Plaintiff to recover them against the Defendant *Wagner*. But *Wagner* has been the cause of the whole litigation, and the Plaintiff is entitled to recover the costs he has had to pay to the *Stennings* by way of damages from *Wagner*.

Kekewich, in reply as to costs.

(1) Law Rep. 9 Eq. 636.
(2) 11 East, 633.
(3) Law Rep. 7 Q. B. 316.
(4) Ibid. 9 Q. B. 249.

C. A.
1879
CHILD
v.
STENNING.

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Fry*, in which he has given £400 damages for a breach of a covenant for quiet enjoyment. Now, the facts of the case, so far as it is necessary to state them, are few. Mr. *Wagner* had granted a lease to Messrs. *Stenning* of some land, together with the rights of way belonging thereto. He afterwards granted a lease to the Plaintiff of some land, and after that grant of the lease to the Plaintiff, Messrs. *Stenning* alleged that they had right of way over part of the land. Mr. *Wagner* denied that they had any such right, or that he had granted any such right, and informed the Plaintiff that Messrs. *Stenning* were trespassers, and liable as such. Thereupon Mr. *Child* brought this action against the *Stennings* to restrain them from interfering with or trespassing on his land, and he also joined as Defendant Mr. *Wagner*, asking against him the alternative relief that if it should turn out that the *Stennings* were not trespassers, and had a right of way, then that Mr. *Wagner* should pay damages for the breach of covenant for quiet enjoyment covenanted in his lease to *Child*. When the cause came on at the trial, Mr. *Wagner* supported Mr. *Child* in his contention, but the *Stennings* succeeded in proving to the satisfaction of the Judge—and there is no appeal from the decision on that point—that, under the grant of the rights of way belonging to the land leased to them, the right of way in question passed so that they were entitled to a right of way; and it consequently follows that the Plaintiff would be entitled to what damages he should prove, as against Mr. *Wagner*, under the covenant for quiet enjoyment up to the date of the issuing of the writ, for that is the time up to which the damages are calculated when there is no eviction. It has been held that where there has been eviction, so that you can never have another action under the covenant for quiet enjoyment, but are evicted for ever, there, of course, the damages must be assessed once for all. But where there has been no eviction, the damages are only the damages actually sustained; because you cannot tell what will happen in the future, or how far persons who have a right to interfere and disturb the quiet enjoyment may choose to avail themselves of that right, or whether they will interfere at all. That being so, the evidence ought to have been

C. A. 1879 CHILD v. STENNING. Jessel, M.R.

directed to shew that some actual damage had been sustained by the Plaintiff by reason of the interference of the *Stennings* by the exercise of their right of way before the issuing of the writ. On considering the evidence, I can find nothing of the kind. The evidence of the Plaintiff shews damage done to him by the stacking of timber on part of the land by the *Stennings;* but that was not an exercise of the right of way. If they had no right to stack it, of course it was a trespass. But that is not an element of the damage which he can recover against Mr. *Wagner.* Then there is the evidence of the surveyor as to the diminished value of the land as building land, which would be available, no doubt, if the action had been on a covenant for title, that is, a covenant that the vendor was seised, or that the lessor had a right to convey, but which is not admissible in an action merely for breach of the covenant for quiet enjoyment. Beyond that, there is really nothing in the shape of evidence. The result, therefore, must be that the damages will be the usual damages in an action to try a right, that is, it should be 40*s.*

But the Respondent on the appeal complains that the Judge in the Court below, while he made him—which was quite proper—pay the costs of the *Stennings*, against whom the action wholly failed, did not give him those costs over again against the Defendant *Wagner.* I think that he is entitled to complain of so much of the decision. Who was the cause of the action? Whose error was it that gave rise to the whole litigation? Clearly Mr. *Wagner's.* It was his grant to the *Stennings* which gave them the right of way of which the Plaintiff complained. Who incited the Plaintiff to bring an action against the *Stennings?* Who almost requested him to do so? Mr. *Wagner.* He represented to the Plaintiff, and even up to the time of trial insisted upon that representation, that he had made no grant of the right of way to the *Stennings*, and that they were mere trespassers. It appears to me on principle, that he who was the person who caused the litigation, or whose error or representation caused it, ought to be the person to pay the costs of it. There is a somewhat analogous decision in the case of *Williams* v. *Burrell* (1). There there was a tenant for life with a power of leasing. He demised for ninety-nine years, if three persons should so long live. There was a

(1) 1 C. B. 402.

covenant which the Court held was a covenant for quiet enjoyment. After the death of the tenant for life, it was held that the power was badly executed, so that the lease terminated with his life. The assignee of the lease having brought an action against the executor of the tenant for life who granted the lease, and it having been shewn that the executors were cognizant of the defence to the ejectment which had been brought by the remainderman, and had asked the lessee to defend, the Court of Common Pleas unanimously gave as damages, in addition to the value of the property, the costs incurred in defending the ejectment by the person who was evicted by the remainderman, entirely, as it appears to me, on the ground that they instigated the defence, and insisted upon the thing being tried out to shew whether or not the lease was valid.

Now that certainly applies to this case. Mr. *Wagner* insisted upon his rights—that is, his right to grant the land to the Plaintiff free from the right of way up to the moment of trial. He insisted on that question being decided, and it appears to me on principle that he ought to pay the costs of it, and therefore that the order should be varied, first, by reducing the damages to 40*s*., and next, by adding to the costs of the Plaintiff the costs which he had to pay *Stennings* in the Court below.

As regards the costs of the appeal, it appears to me that in fact both sides have succeeded and both sides have failed, and therefore that there should be no costs of the appeal.

JAMES, L.J.:—

I am entirely of the same opinion, and I must say that I should have struggled hard to sustain the judgment of Mr. Justice *Fry* for £400 if I had been impressed more than I have been with the substantial accuracy of the surveyor's evidence, which I am bound to say has not impressed me at all. I may throw out for the comfort of Mr. *Child*, who thinks that he has been deprived of so much of this property, that the surveyor does not seem to have taken into his consideration what probably Mr. *Child* may now take into his consideration, that there is nothing in this right of way that Messrs. *Stenning* have established to prevent him from building over the piece of ground, and building any house, ware-

C. A. 1879 — CHILD v. STENNING.

house, yard, or store of timber to any height he likes, so that he does not interfere with the passage of the waggons under that covered way through the doorway. In other respects, I agree entirely with what the Master of the Rolls has said.

BRAMWELL, L.J., concurred.

Solicitors: *Smith, Fawdon, & Low*, agents for *Lamb, Brighton; Stibbard & Co.*, agents for *Woods & Dempster, Brighton.*

C. A. 1879 — *Feb.* 28; *March* 3.

DUNCAN, FOX, & CO. *v.* NORTH AND SOUTH WALES BANK.

[1878 D. 49.]

Principal and Surety—Parties to Negotiable Instrument—Right of Surety to Securities held by Creditor.

12 Ch D 561
19 Ch D 623

The rules as to a surety's right to securities do not apply where the only suretyship is created by indorsing and discounting a bill of exchange.

R., a member of the firm of *R. & Co.*, deposited with a bank the title deeds of his real estate to secure the floating balance due from the firm to the bank. After this *R. & Co.* bought a cargo from *D., F., & Co.*, and offered a bill accepted by themselves in part payment. *D., F., & Co.* were unwilling to receive it, but said that if the bank, who were also their own bankers, would take the bill without their indorsing it, they would receive it in payment. The bank declined to do so, but the manager said he believed that the liability incurred by indorsing it would be merely nominal. *D., F., & Co.* thereupon indorsed it and paid it into the bank, who carried the amount to their credit. *R. & Co.* stopped payment before the bill became due, and executed a deed of inspectorship. The bank were still the holders of the bill. *D., F., & Co.* claimed to have the deposit security of *R.* handed over to them on their paying to the bank the floating balance due to them upon that security:—

Held (reversing the decision of *Little*, V.C.), that *D., F., & Co.* had no claim upon this security, for that the mere fact of their being indorsers of a bill of exchange, though it made them in some sense sureties for the acceptor, did not do so for the purpose of entitling them to the benefit of securities which another party to the bill held from the acceptor; and, further, that the security in the present case was not a security given by the acceptor, but by a surety as between whom and *D., F., & Co.* the latter were primarily liable.

Overruled by Ex parte Edwards, In re Kershaw, 6 Ch D 358

THIS was an appeal by the Defendants *Balfour, Williamson, & Co.*, from a decision of the Vice-Chancellor of the Chancery of the County Palatine of *Lancaster.*

Samuel Collins Radford was a member of the firm of *Samuel Radford & Sons*, who were desirous of opening a discount account with the *North and South Wales Bank*. On the 1st of December, 1874, *S. C. Radford* deposited with the bank the title deeds relating to two freehold properties of which he was owner in fee, and signed in respect of each property a memorandum of that date by which he acknowledged that the deeds had been deposited "in pledge to secure to the said bank the balance for the time being owing to the bank by my firm of *S. Radford & Sons* for discounts and advances, and for all other moneys in which the said firm, whether alone or jointly with any other person or persons, were or might from time to time thereafter be or become indebted or liable to the said bank, or the said bank was or might be or become indebted or liable on their account, or which the said bank might at any time claim against the said firm, and notwithstanding that the said bank might enter into any arrangement giving time or facilities for payment, or might release or compound for such debt to or with any person liable to pay the same." *S. Radford & Sons* kept their ordinary banking account with other bankers.

In November, 1875, *Duncan, Fox, & Co.* sold a cargo of wheat to *S. Radford & Sons*, to be paid for in cash. The wheat was delivered, and part of the price paid in cash. *James Radford*, a partner in the firm of *S. Radford & Sons*, asked *Duncan, Fox, & Co.* to take a bill of exchange for the remainder of the price, to which *Duncan, Fox, & Co.* objected, and Mr. *Duncan*, who acted for *Duncan, Fox, & Co.*, proposed that *S. Radford & Sons* should discount the bills they proposed to draw with their own bankers and hand over the proceeds. *James Radford* then said that if *Duncan* would inquire at the *North and South Wales Bank*, who were the bankers of *Duncan, Fox, & Co.*, he would find that it would be all right with *S. Radford & Sons'* bills. *Duncan* replied: "If the bank will accept those bills without our indorsement, then I can oblige you." *Duncan* accordingly saw the manager of the bank, who said it would be contrary to all custom to pass the proceeds of the bills to the credit of a person whose name was not upon them, but that he believed *Duncan, Fox, & Co.* would incur no more than a nominal responsibility by putting their name upon

C. A. 1879 — DUNCAN, FOX, & CO. v. NORTH AND SOUTH WALES BANK.

them. *Duncan, Fox, & Co.* thereupon agreed to take the bills. They were three bills, for £5000, £2000, and £1920 15*s.* 3*d.*, drawn upon *S. Radford & Sons* by *Maxwell Brothers*, the brokers through whom the cargo was sold, and accepted by *S. Radford & Sons.* They were indorsed by *Duncan, Fox, & Co.* to the *North and South Wales Bank*, who carried the amount to the credit of *Duncan, Fox, & Co.* They became due on the 28th of February, 1876. Two bills were discounted by the bank under very similar circumstances for *Jonathan Robinson & Co.*, being also bills accepted by *S. Radford & Sons.*

In January, 1876, *S. Radford & Sons* stopped payment, and the above bills, of which the bank were still the holders, were dishonoured. On the 24th of February, 1876, *S. Radford & Sons* executed a deed of inspectorship between themselves and their joint creditors.

Duncan, Fox, & Co. were not aware of the existence of the security given by *S. C. Radford* to the bank at the time when the bills were discounted, but having become aware of it after the stoppage, they and *Jonathan Robinson & Co.* commenced their action in the Chancery of the County Palatine against the bank, *S. C. Radford*, and *S. Radford & Sons*, and against *Williamson, Balfour & Co.*, who by an order made in the action were appointed to represent the creditors of *S. Radford & Sons* other than the Plaintiffs and the bank. The statement of claim contained allegations shewing that when the securities of December, 1874, were realized, the bank, after paying all moneys for which *S. Radford & Sons* were liable to them, except the above bills, on which the Plaintiffs were liable, would have a considerable balance in hand, though not enough for payment of those bills; that the bank had demanded payment of the bills from the Plaintiffs; that the Plaintiffs had offered to pay to the bank the balance due to them from *S. Radford & Sons*, after deducting the amount which had been already realized under the securities, upon the bank transferring their securities to them, but that the bank had refused to do so; and the Plaintiffs claimed to have it declared that they were sureties for the payment by *S. Radford & Sons* of the balances due on the bills of exchange; to have an account taken of what was due to the bank from *S. Radford & Sons* after deducting what had

been realized by sale; and the Plaintiffs offering to pay the balance so found due, that the bank might be ordered to transfer the securities to them; and for foreclosure against *S. C. Radford;* and that, so far as the bank had not applied or should not apply the balance of the proceeds of the securities in their hands in discharge of the bills on which the Plaintiffs were liable after duly applying such proceeds in payment of all other liabilities to which the same were properly applicable, it might be declared that the Plaintiffs had been discharged from all liability to the bank on the bills.

Vice-Chancellor *Little* on the trial said: "The second question is whether the Plaintiff firms are sureties for these acceptances. When we have found that *Radford & Sons* are the acceptors, and that these acceptances have been dishonoured, I suppose that there is not any vacuum to be supplied in the inquiry whether the indorser to whom the acceptance has been handed is a surety to the banker who has discounted the bill. That is elementary law as applied to bills of exchange."

His Honour accordingly made an order directing the bank to hand over their securities to the Plaintiffs, on payment to them by the Plaintiffs of the balance remaining due to them.

Balfour, Williamson, & Co., as representing the creditors of *S. Radford & Sons* other than the Plaintiffs and the bank, appealed from this judgment. The appeal came on to be heard on the 28th of February, 1879.

Benjamin, Q.C., *Marten*, Q.C., and *F. Thompson*, for the Appellants:—

We contend that the rules of equity as to the rights of principal and surety are applicable only to a limited extent in the case of bills of exchange. The rights of parties to bills of exchange are governed by the law merchant, and according to the law merchant an indorser is not a mere surety, but stands also in the position of a principal. To introduce all the rules of principal and surety as between the parties to negotiable instruments would be productive of intolerable inconvenience. Take the case, not an uncommon one, of a bill being discounted in the ordinary way of business by a banker who holds a covering security from the acceptor; if another party to the bill pays, is he to be entitled to

C. A. 1879 DUNCAN, FOX, & Co. v. NORTH AND SOUTH WALES BANK.

claim an interest in the covering security? To apply the rules in *Newton* v. *Chorlton* (1) and *Pledge* v. *Buss* (2), in cases of bills of exchange, would paralyse commercial transactions.

[JAMES, L.J.:—Is it not a mere metaphor to say that one of the parties to a bill merely as such is a surety for another of them?

JESSEL, M.R.:—*S. C. Radford* gave the security as surety for *S. Radford & Sons.* What right has another surety for *S. Radford & Sons* to claim the benefit of it? It is not a security given by the principal debtor.]

We submit that he has no such right: *Wade* v. *Coope* (3). The rules as to parties to bills are in some respects more stringent than the ordinary rules between principal and surety, for a party who pays has no remedy against prior indorsers unless he gives notice of dishonour.

[JESSEL, M.R.:—That does not negative suretyship; it is consistent with suretyship upon certain terms.]

[*Levi & Co.'s Case* (4) was also referred to.]

[They were stopped by the Court.]

Robinson, Q.C., and *Neville*, for the Plaintiffs:—

All parties to the transaction had distinct notice that we wanted the money, not for ourselves, but for the purposes of *Radford & Sons*, and if it had been completed, not by bill, but by agreement, it would have been a clear case of suretyship. The case, therefore, is not the mere case of bills brought to the bank by us to be discounted.

[JESSEL, M.R.:—Your difficulty is that the money was advanced to your firm.]

But with express notice that we were sureties.

[JESSEL, M.R.:—The bill might have been rediscounted, and what would then have been your position?]

The real bargain was that *Radford & Sons* should pay, and that we should pay if they did not; that is suretyship, though worked

(1) 10 Hare, 646; 2 Drew. 333.
(2) Joh. 663.
(3) 2 Sim. 155.
(4) Law Rep. 7 Eq. 449.

out by means of a bill of exchange. When *Radford & Sons* stopped payment the bank were the holders, and *Radford & Sons* were primarily liable to pay as acceptors. If they could not pay, we could be sued, but only as sureties.

[JESSEL, M.R.:—Take the case of the holder borrowing money from the bank, and indorsing the bills to the bank as security.]

If the bank then received money which they could apply in payment of the bills, we say it would be their duty so to apply it, and that, if they did not, they would *pro tanto* discharge the surety.

[JAMES, L.J.:—As between you and the bank it was simply a case of discounting *Radford & Sons'* bills. There is no relation of debtor and creditor between the bank and the acceptor, but only a right to sue the acceptor on the bill.]

In *Wulff* v. *Jay* (1), a plea that money had been received which could be applied in payment of the debt was held good. We could maintain an action to make persons pay who were liable in priority to us: *Wooldridge* v. *Norris* (2). If the security given by the first surety is enough to cover the debt secured by the second suretyship, the creditor ought so to apply it, and the second surety can call upon him to do so.

[JESSEL, M.R.:—You may as well say that the first surety has all the rights of the creditor, and so may require him to sue the second surety.]

That depends on the nature of the contract with the sureties.

Sir *H. Jackson*, Q.C., *Rotch*, and *Charles Peile*, for the *North and South Wales Bank*.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Little*, which raises a very important point as regards commercial law. The facts which it is necessary to state are not numerous. There was a firm of *Samuel Radford & Sons*, which was indebted to the *North and South Wales Bank*, and the bank requiring security,

(1) Law Rep. 7 Q. B. 756. (2) Law Rep. 6 Eq. 410.

C. A. 1879

DUNCAN, FOX, & CO. v. NORTH AND SOUTH WALES BANK.

Jessel, M.R.

one of the partners in that firm, *Samuel Collins Radford*, signed two memoranda, one of which is set out in paragraph 3 of the statement of claim. They both referred to real estate, the property of *Samuel Collins Radford*, which real estate he pledged with the bank by these memoranda for securing the balance for the time being owing to the bank by the firm of *Samuel Radford & Sons* on any account whatever. That is the substance of the memoranda. At a subsequent time two firms, of which I need only mention one, because they stand on the same footing, one of them being *Duncan, Fox, & Co.*, sold certain corn to *Samuel Radford & Sons*. *Samuel Radford & Sons* paid for it in part, and were unable to pay for the other part, and thereupon, not *Samuel Collins Radford*, but one of the other partners, *James Radford*, told *Duncan, Fox, & Co.* that the firm of *Radford & Sons* would give them a bill, and that they could discount the bill with the *North and South Wales Bank*, who were the bankers of *Duncan, Fox, & Co.* Accordingly *Duncan, Fox, & Co.* took the bill, discounted it with the *North and South Wales Bank*, and applied the proceeds in payment of the debt due to them from *Radford & Sons* for the cargo of corn. That was an ordinary discount transaction between the bank and *Duncan, Fox, & Co.* *Duncan, Fox, & Co.* did not even know of the existence of the two memoranda of deposit by *Samuel Collins Radford* by which he pledged his real estate as security for the balance for the time being owing by *Radford & Sons*. The position of *Duncan, Fox, & Co.* was simply the position of any other indorser of a bill of exchange who discounts a bill. They were principal debtors as regards the bank, who advanced the money, though they might be, and in certain respects undoubtedly were, in the position of sureties as regards the acceptors or prior indorsers of the bill of exchange.

Then what was the position of the bank as regards *Duncan, Fox, & Co.?* Is it to be tolerated that without the consent of the bank, without their knowledge of the real position of *Duncan, Fox, & Co.* and *Radford & Sons*, as to whether, for instance, the bills were accepted for the accommodation of the drawer, or for value given by the acceptors, or were or were not liable to set off, *Duncan, Fox, & Co.* should be treated as sureties for all purposes as between the bank and the discounters of the bill, so as to

prevent the bank at any time thereafter dealing with these securities deposited by *Samuel Collins Radford*, or interfering in any way with these securities? The consequences of such a doctrine would be alarming. No bank which held a security from its customers could venture to discount a bill with eight or ten names without examining carefully to see if any one of the names was the name of a debtor of the bank who had given them security, and if they did discount it they might be put in the position of being incapacitated from carrying on their dealings with their customers by varying the securities given by a customer to the bank. To extend the doctrine to such a case as this would paralyse the business of discounting bills of exchange, and it would be unwise, as far as this Court is concerned, to extend for the first time the doctrine of principal and surety, which, for certain purposes, extends to bills of exchange, to such a transaction as this. On this ground alone I think the decision cannot be supported.

But there is another ground which appears to me equally fatal to the claim put forward by the Plaintiffs in this case. The deposit by *Samuel Collins Radford* was a deposit itself in the nature of a suretyship. *Samuel Collins Radford* was the owner in fee of this property, which was his own separate property, and by making it chargeable to the bank for the debt of the firm he put this property in the position of a surety for the debts of the firm. He was not liable, except as partner, for these debts. Therefore, as between himself and the firm and the bankers, this estate was in the position of surety. Now, surety for what? Surety for the balance for the time being owing from the firm to the bank on any account whatever. Assuming that the Respondents are entitled to put themselves in the position of sureties for any purpose as between the bank and the firm of *Radford & Sons*, still they are sureties who, as between themselves and the bank, have had the money, and are principal debtors to the bank, and are special sureties, therefore, in respect of the particular transaction. Now as between two sureties, assuming there is no specialty in the contract for suretyship, the utmost right they could have would be that of contribution. It cannot be said that in every instance a surety is entitled to stand in the place of the principal creditor

C. A. 1879

DUNCAN, FOX, & CO. v. NORTH AND SOUTH WALES BANK.

Jessel, M.R.

as regards other securities. That is true as regards securities given by the debtor, but is not true as regards securities given by co-sureties. As I said before, in the ordinary case, if there is no specialty in the matter, if they are contemporaneous suretyships and relate to the same transaction, they have a right to contribution. Therefore that would not support the decree made. But when you come to look at the nature of this transaction, it is plain there is no right to contribution. The primary right to suretyship, so to say, is with *Samuel Collins Radford.* He made his property surety for the balance for the time being owing, but he had a right to say, as regards the subsequent transaction, "You lent money to *Duncan, Fox, & Co.;* they are the parties liable to you; sue them, and reduce the balance." They had no right, as between themselves and *Samuel Collins Radford*, to call on the bank first of all to apply his property for that for which they were primarily liable, and it appears to me the peculiar relation of the parties negatives this right of contribution. Even assuming that for this purpose they were entitled to occupy the position of sureties, they were sureties not only subsequently in order of date, but with a primary liability as distinguished from the general liability. Therefore it appears to me they could have had no right of contribution, and that on this ground also the action should have been dismissed.

JAMES, L.J.:—

I am of the same opinion, and I do not think it necessary to add anything to what the Master of the Rolls has said on the one point, which of itself seems perfectly fatal to the Plaintiff's case, and which seems to have been overlooked in the argument of the case in the Court below—that is, that *Samuel Collins Radford's* estate was really, in fact, not a principal debtor at all, and was not liable to be dealt with as a principal debtor; that his estate was only a surety; and that, if there was any contribution at all (I do not mean to say there is that equity), *Radford* would certainly have more ground for saying to *Duncan, Fox, & Co.* "Contribute to relieve me," than they would have for saying, "Contribute to relieve us."

But what I desire to say is this: that, as a matter of mercantile law—and I say this for the purpose of preventing any embarrassment which would be certain to arise from an extension of the rule in mercantile cases of this kind—the equities of principal and surety cannot arise accidentally and promiscuously from the position of names on the face or the back of a bill of exchange which a man hands to his bankers, or to a merchant in the ordinary course of business; and that where a man takes a bill of exchange to a banker or a bill broker and asks him to lend him money on it, which he does, he is still the principal debtor, and he has no right to ask, nor has the banker or bill broker any right to tell him, whether any of the other names on the bill are customers, or what security they have from any of them, or anything of the sort.

BRAMWELL, L.J.:—

I am of the same opinion, but I have nothing to add.

Solicitors: *Gregory, Rowcliffes, & Rawle; G. L. P. Eyre & Co.*

MASON *v.* HARRIS.

[1878 M. 80.]

Company—Suit by Shareholder on behalf of all the other Shareholders—Suit in Name of Company.

Two shareholders in a company commenced an action against *H.*, the managing director of the company, and two other directors, and the company, for the purpose, *inter alia*, of setting aside for fraud a sale by *H.* to the promoters which was adopted by the company. The statement of claim alleged that *H.* and the other two directors who were Defendants formed a majority of the board, and that the two were under the control of *H.* and refused to take any steps with reference to the acts complained of, and that *H.* possessed such a preponderance of votes that no steps could be taken within the company to remedy those acts. *H.* demurred, on the ground that the frame of the action was improper, as it ought to have been brought in the name of the company. The demurrer was allowed by Vice-Chancellor *Malins*, with liberty to amend by adding the company as a Plaintiff:—

Held, on appeal, that the acts complained of being acts which a majority

C. A.
1879
MASON
v.
HARRIS.

could not sanction so as to bind the minority, and there being allegations shewing that it was impossible to get the company to impeach those acts, a demurrer on the ground that the company ought to have been Plaintiff could not be sustained.

Duckett v. *Gover* (1) explained.

THIS was an action by *Mason* and *Carter* on behalf of themselves and all the shareholders in the *Hull Central Drapery Company, Limited,* except the persons named as Defendants, against *Harris, Shipstone, Mead,* and the company, to set aside for fraud an agreement dated the 1st of May, 1877, and to restrain *Harris* from continuing to act as managing director of the company, and from negotiating or parting with any bills of exchange belonging to the company, and from retaining in his possession or using for his own purposes any property of the company, and from transferring or selling the vendor's shares in the company.

The allegations in the statement of claim were to the following effect:—

1 and 2. By an agreement dated the 1st of May, 1877, between *Harris,* thereinafter called the vendor, of the one part, and the Plaintiff *Mason, Walker,* the Defendants *Shipstone* and *Mead* and *Hancock,* and *Bainbridge,* thereinafter called the promoters, of the other part, it was agreed that the promoters should forthwith take the necessary steps for forming and incorporating a limited company under the above name, with a nominal capital of £30,000 in 3000 £10 shares. The board of directors to consist of not more than five and not less than three members. *Harris* to be managing director for five years at a salary of £360 a year, with such further remuneration as therein mentioned if the dividend exceeded 7½ per cent. *Harris* agreed to sell to the company when incorporated, and the promoters agreed that the company should purchase upon the terms therein mentioned, certain freehold business premises and the business and goods therein mentioned. The price to be for the freehold £7300; for the trade fixtures, plant, and utensils, £675; for the stock in trade, £6322; and for the goodwill, &c., £3511. The sum of £5000, part of this purchase-money, was to be paid in 1000 shares treated as paid up to the extent of £5 per share. £5000 more was to be paid within

(1) 6 Ch. D. 82.

six months by equal weekly instalments, and the balance within twelve months, each instalment to be secured by a bill drawn by the vendor upon and accepted by the company. The unpaid purchase-money was to carry interest at £5 per cent. per annum, and the 1000 vendor's shares were not to be saleable or transferable by the vendor till after the 14th of May, 1882.

3. The company was registered on the 12th of June, 1877.

4, 5, 6. The memorandum stated the objects of the company to be the purchasing the above premises and business and the carrying on such business, and the capital to be £30,000 in 3000 £10 shares. The articles provided that the vendor's shares should not be transferable till after the 14th of May, 1882; and that on every question to be decided by a poll every member should have one vote for every two shares up to ten, one additional vote for every five shares beyond the first ten up to twenty, and an additional vote for every ten shares after twenty.

7. Shortly after the incorporation of the company the Plaintiff *Carter* was appointed secretary and is a holder of fifty-eight shares.

8. The Plaintiff *Mason* was a director till shortly before the issue of the writ, and is a holder of twenty-five shares.

9, 10. The agreement of the 1st of May, 1877, was entered into on the faith of representations by *Harris* to the promoters that the profits for the years 1875 and 1876 had amounted to £3511. The agreement between the parties was that the sum to be paid for the goodwill should be two years' profits, and £3511 was inserted in the agreement as the price of the goodwill on the vendor's accountant certifying that the profits for the two years had amounted to that sum.

11, 12. The company on its incorporation commenced business, and shortly afterwards *Carter* discovered that the profits of the business in 1875 and 1876 had been but a little over £300 a year.

13, 14. At the first meeting of the directors *Carter* informed them of the last-mentioned fact, and the directors directed that an accountant should be employed to ascertain the actual profit for 1875 and 1876, but no accountant has been appointed nor any further inquiry made into the matter.

15. *Harris* made the representation as to the profits knowing it to be false.

C. A. 1879 MASON v. HARRIS.

16. In September, 1877, the company being in want of money, the Plaintiff *Mason* handed some title deeds of property of his own to *Carter* and *Harris* that they might be deposited with the company's bankers to secure an advance to the company. *Harris* took the deeds and deposited them to secure the balance of his own account.

17, 18. On or about the 17th of November, 1877, *Harris* took away about £200 cash belonging to the company, and about the same time one of his sons by his direction took away some bills belonging to the company. At a meeting of directors on the 19th of November, *Harris* admitted that the money had been taken by him, and the bills taken for him, and promised to replace the cash and give the company an indemnity against the bills; but on the following day he refused to give such indemnity and still refuses to do so.

19. Another meeting of directors was held to investigate the matters in pars. 17 and 18; but in consequence of the conduct of *Harris* it had to be adjourned in confusion. Subsequently, on the 27th of November, *Harris* called in seven or eight persons, and compelled *Carter* under threats of personal violence to hand over the property of the company and leave the offices.

20. *Harris*, though often applied to, has not returned the deeds or bills.

21. Only one dividend has been paid. It was declared by the directors under the influence of *Harris*, though no profit had been made.

22. *Harris* has dealt with the vendor's shares in a way prejudicial to the company.

23. *Harris* is in necessitous circumstances, and if allowed to retain the bills of exchange will negotiate them for his own private purposes, and if allowed to retain his position will further apply the property of the company to his own use.

"24. The Defendant *Shipstone* is a near relative, and the Defendant *Mead* a shopman of the Defendant *B. Harris*, and relative of the Defendant *Shipstone*, and both are directors of the Defendant company, and as directors they have aided and abetted the Defendant *B. Harris* in the acts thereinbefore mentioned, and they refuse to take any steps whatsoever with reference to such

acts, and they and the Defendant *B. Harris* form a majority of the board of directors of the Defendant company.

"25. By reason of the 1000 vendor's shares which have been given to the Defendant *B. Harris* under clause 10 of the said agreement of the 1st of May, 1877, the Defendant *B. Harris* has under the 86th article of the said articles of association 106 votes at any general meeting of the Defendant company.

"26. Besides the Defendant *B. Harris* there are in all about thirty-one shareholders in the Defendant company holding in the aggregate about 311 shares. Out of the 311 shares, however, 151 or thereabouts are held by relatives or nominees of the Defendant *B. Harris*, and the calls on such shares have not been duly paid up in accordance with the articles of association, and the holders of such shares are not entitled to vote at any general meeting of the Defendant company.

"27. Of the remaining 160 shares the Plaintiffs and shareholders agreeing with them represent over 100 shares, and but for the votes of the Defendant *B. Harris* would have a majority of votes at a general meeting of the Defendant company.

"28. In consequence of the preponderating number of votes possessed by the Defendant *B. Harris*, it is impossible for the Plaintiffs or any shareholders to take any steps within the Defendant company to remedy the acts of the Defendant *B. Harris* hereinbefore mentioned, and if such acts be not forthwith remedied, and the Defendant *B. Harris* removed from his office of managing director, or restrained from interfering in the affairs of the Defendant company, the said company will be ruined and the Plaintiffs' property therein destroyed."

The nature of the relief claimed is stated above.

Harris demurred on the ground that the allegations in the statement of claim did not shew any cause of action in respect whereof the Plaintiffs were entitled to sue, or to which effect could be given by the Court against him, and further, as to so much of the statement of claim as sought to have the agreement of the 1st of May, 1877, set aside, that the Plaintiffs had no such interest therein as would entitle them to sue *Harris* in respect thereof, and that even if they ever had such interest, they had by their laches, delay, and acquiescence, disentitled themselves to the relief claimed,

C. A. 1879 MASON v. HARRIS.

and as to the whole of the statement of claim, on the ground that the Plaintiffs were not entitled, either alone or on behalf of the shareholders or any of them, to sue *Harris* in respect of the matters in question.

Shipstone and *Mead* demurred on the ground that the facts alleged in the statement of claim did not shew any cause of action to which effect could be given by the Court as against them, and because no such relief as thereby sought could be given at the suit of the Plaintiffs, or any person or persons other than the company.

The company put in a statement of defence, submitting that no such relief as thereby sought ought to be or could be granted, if at all, except at the suit of the company.

The demurrers came on to be heard before Vice-Chancellor *Malins* on the 22nd of January, 1879.

Higgins, Q.C., and *Ingle Joyce*, for the demurrer of *Harris*:—

The principal objection we raise is that the company ought to have been the Plaintiffs in this action. In this respect it is like the case of *MacDougall* v. *Gardiner* (1), where Lord Justice *James* said there might be a variety of things which a company might well complain of, but which they might not think it right to make the subject of litigation, and it was the company as a company which had to determine whether it would take steps itself to prevent the wrong being done. The form of the action is incorrect, as it is brought by a shareholder on behalf of himself and the other shareholders. That was held to be an improper form in *Gray* v. *Lewis* (2), where Lord Justice *James* said it was very important to adhere to the rule in *Mozley* v. *Alston* (3), and *Foss* v. *Harbottle* (4), by which the law was settled that when there is a corporate body capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, then that corporate body is the proper Plaintiff, and the only proper Plaintiff. The same principle was applied in *Morris* v. *Morris* (before Vice-Chancellor *Hall*, January 15th, 1877). If the company is not made Plaintiff, then it is the duty of the Plaintiff to shew that he has exhausted all the means in his power

(1) 1 Ch. D. 13.
(2) Law Rep. 8 Ch. 1049.
(3) 1 Ph. 790.
(4) 2 Hare, 461.

Case H.W. (1879). 6.

of obtaining a remedy through the company: *Atwool* v. *Merryweather* (1). We say further, that even if the company were Plaintiff no relief could be had, for that the agreement sought to be set aside was not an agreement made with the company at all.

Glasse, Q.C., and *Wilkinson*, in support of the bill:—

Harris having got a majority of the directors on his side, and a majority of votes in his hands, there must be liberty to sue in this way, otherwise a fraud committed by a majority of shareholders on the minority would be without remedy. In the case of *In re Imperial Bank of China and Japan* (2), liberty was given to two dissentient shareholders to take proceedings for setting aside a resolution come to by the majority of the shareholders, and in *Menier* v. *Hooper's Telegraph Works* (3) it was held that the bill was properly filed by one shareholder on behalf of himself and the other shareholders, against the company; and this was also the form of the action in *Moffatt* v. *Farquhar* (4). But if the Court should be of opinion that the company ought to be Plaintiffs, then there is power given by Rules of Court, 1875, Order XVI., rule 2, to allow the company to be added as Plaintiffs. This was done by the Master of the Rolls in *Duckett* v. *Gover* (5). As to the objection that this is not a contract by the company, it was a contract entered into on behalf of the company before formation, adopted by the company when formed, and carried into effect by the funds of the company, so that there must be the same rights as if the company had originally been a party to it.

MALINS, V.C.:—

This company was originally promoted by *Harris*, and his views were carried into effect by the formation of the company, and by raising the money by calls, and the company took the contract upon themselves. That was the point I decided in *Spiller* v. *Paris Skating Rink Company* (6), where I held that a company had power to ratify a contract made by the promoters before the company was in existence.

(1) Law Rep. 5 Eq. 464, n.
(2) Ibid. 1 Ch. 339.
(3) Ibid. 9 Ch. 350.
(4) 7 Ch. D. 591.
(5) 6 Ch. D. 82.
(6) 7 Ch. D. 368.

C. A. 1879 MASON v. HARRIS. V.-C. M.

It is, therefore, a contract by *Harris* to sell, and by the company to purchase, this business. The bill then alleges that the value of the profits of the business were stated by *Harris* to have been £3500 for two years, whereas they were in fact only a little over £300 per annum, and that the larger amount was stated by *Harris* wilfully and fraudulently, knowing it to be false. So here I have an allegation that these statements were wilfully and fraudulently made. It is the common case of a man selling a business, and grossly overrating the value of it. Then there is the charge of taking away cash and bills belonging to the company. These are allegations which for the present purpose I must assume to be true, and so also as to the charges introduced for the purpose of shewing that the control of the company is in the hands of *Harris*, and the Plaintiff is therefore unable to obtain redress. The claim, therefore, is, that the agreement may be delivered up to be cancelled on the ground of fraud, and that *Harris* may pay back the money which he has fraudulently obtained, and an injunction to restrain *Harris* from retaining in his possession, or using for his own purposes, any property of the company.

Now upon the allegations in this claim, if they turn out to be true, it is clear that *Harris* will be bound to pay back every farthing he received under the contract he has obtained, because he has obtained the money, according to these allegations, under false representations, and if he has to pay back the money, it will be to the company. I think in all such cases it is better that the company should be the Plaintiffs, unless there are any special grounds making such a course improper, as, for instance, where there is a majority overbearing the minority. That was the case in *Atwool* v. *Merryweather* (1), and so again in *Menier* v. *Hooper's Telegraph Works* (2), where the majority of a company proposed to benefit themselves at the expense of the minority; there the Court held that the bill was rightly filed by one shareholder on behalf of the others against the company.

Now, if it were necessary to decide the case, I should come to the conclusion that these Plaintiffs are entitled to sustain the action. It does not come within those cases in which individual

(1) Law Rep. 5 Eq. 464, n. (2) Law Rep. 9 Ch. 350.

shareholders can sue instead of using the name of the company, and before *Duckett* v. *Gover* (1) was cited, I suggested that it would be better to have the name of the company used, in order to have the real question decided. That would, I thought, be the most reasonable course, but I have been referred to that case of *Duckett* v. *Gover*. There the case was that a shareholder brought an action on behalf of himself and other shareholders against the company's solicitors and vendors, to set aside an alleged secret and fraudulent contract, and to recover a large sum of money for the company from their solicitors, the company being joined as Defendants instead of Plaintiffs. There was no reason alleged why the company had been made Defendants instead of Plaintiffs, nor was there any allegation that the Plaintiff was unable to join them as Plaintiffs. It was merely a mistake in the pleading, and the Master of the Rolls allowed the demurrer, and gave leave to the Plaintiff to amend his writ and statement of claim by adding the company as Plaintiffs. The Master of the Rolls in that case availed himself of the power given to the Court by Order XVI., rule 2, to add a Plaintiff to the record where the action has been commenced through a mistake, and in this case I am of opinion that it would be better that the company who have been defrauded should be made Plaintiffs. This appears to me to be a much stronger case than that which was before the Master of the Rolls. If it were necessary to decide now, I should overrule the demurrer, but I think it better, under all circumstances, to allow the demurrer, on the ground that the company ought to be made Plaintiffs, and give the Plaintiff liberty, if he chooses, to amend the record by adding the company as Plaintiffs, and if the Plaintiff does not amend within fourteen days, the action will be dismissed. I will follow the terms of the order in *Duckett* v. *Gover*, and as to costs, they will be reserved till the trial of the action.

An order in the same terms was made upon the other demurrer of *Shipstone* and *Mead*.

The Plaintiffs appealed. The appeal was heard on the 5th of March. C. A.

(1) 6 Ch. D. 82.

C. A. 1879 MASON v. HARRIS.

Glasse, Q.C., and *Wilkinson*, for the appeal:—

The demurrers ought to be overruled. The case is within *Atwool* v. *Merryweather* (1) and *Menier* v. *Hooper's Telegraph Company* (2). We cannot sue in the name of the company when the majority of the directors support *Harris* and he commands a majority of votes. *Duckett* v. *Gover* (3) has no bearing on the case, for the bill there had no allegations corresponding to paragraph 28 of the present statement of claim.

[JESSEL, M.R.:—In that case the suit was framed as it was merely by an oversight on the part of the pleader. The company were in favour of the suit. I gave them an opportunity of deciding whether they would become Plaintiffs, and they determined to become so.]

Higgins, Q.C., and *Ingle Joyce*, for the demurrer:—

The demurrer of *Shipstone* and *Mead* ought to be simply allowed. No case is made and no relief prayed against them.

[JESSEL, M.R.:—The action seeks to set aside an agreement to which they were parties, and it alleges that they being directors aid and abet *Harris* in the unlawful acts complained of.]

Then as to the form of suit, we say that that no relief can be given unless the company is Plaintiff, and we contend that the Plaintiffs ought to have used the name of the company: *Lindley* on Partnership (4). The Court, under Order XVI., rule 2, can order the company to be made Plaintiff, and this was done in *Duckett* v. *Gover*.

[JESSEL, M.R.:—The report is not as clear as it might be on this point, but the fact is that I gave fourteen days to see whether the company would not authorize their being joined as Plaintiffs, and authority was duly obtained. There was afterwards an application to strike out the name of the company on the ground that they had been added as Plaintiffs without authority. This application I refused, being satisfied that the company had duly sanctioned the step.]

(1) Law Rep. 5 Eq. 464, n.
(2) Ibid. 9 Ch. 350.
(3) 6 Ch. D. 82.
(4) 3rd Ed. p. 965.

We submit that, except in cases relating to proceedings *ultrà vires*, an action cannot be commenced by shareholders without giving the company an opportunity of deciding whether it will sue. A poll might be taken, and if a majority of shareholders, exclusive of those under the control of the fraudulent person, are in favour of the action, it may safely be commenced in the name of the company: *Lindley* on Partnership (1).

[JAMES, L.J.:—That is trying the question of fraud as a preliminary step for ascertaining the frame of the action in which it is to be tried.]

Pender v. *Lushington* (2) supports the view that the Plaintiffs could have used the name of the company.

JESSEL, M.R.:—

It is impossible on reading the judgment of the Vice-Chancellor not to see that he would have decided in favour of the Plaintiffs if he had not thought himself compelled by a technical rule to decide against them. The question is whether he was so compelled. I think that he was not, and I think that his conclusion in favour of the Plaintiffs on the merits was correct. The rules applicable to the case are so well expressed in *MacDougall* v. *Gardiner* (3), that I will not attempt to improve upon them. As a general rule the company must sue in respect of a claim of this nature, but general rules have their exceptions, and one exception to the rule requiring the company to be Plaintiff is, that where a fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as unless such an exception were allowed it would be in the power of a majority to defraud the minority with impunity. If the majority were to make a fraudulent sale and put the money into their own pockets, would it be reasonable to say that the majority could confirm the sale. That the Court can in such a case interfere at the suit of the minority is established by *Atwool* v. *Merryweather* (4) and *Menier* v. *Hooper's Telegraph Company* (5). Here it is alleged

(1) 3rd Ed. p. 965.
(2) 6 Ch. D. 70.
(3) 1 Ch. D. 13.
(4) Law Rep. 5 Eq. 464, n.
(5) Law Rep. 9 Ch. 350.

C. A. 1879 MASON v. HARRIS.

that *Harris*, by means of fraudulent misrepresentations, sold property to the promoters of the company at a great over-value, and received money which ought to be repaid to the company even if the transaction is affirmed. It appears from paragraph 24 that *Harris* has obtained such influence over the directors that a majority side with him, and will not do anything to remedy the wrong complained of. It further appears from paragraphs 25, 26, 27, and 28, that *Harris* holds such a number of shares that he can outvote those who wish the sale set aside. By reason, therefore, of his influence with the directors and his number of votes he has the sole control of the company. The case is precisely within the rules laid down by Lord Justice *James* in *Menier* v. *Hooper's Telegraph Company* (1). Is it reasonable to say to a minority of shareholders who are defrauded by the majority that they must apply to the company to institute proceedings? Even independently of the authorities I should be prepared to say no. Facts are alleged which shew it to be impossible to get the company to impeach the acts complained of. On demurrer the truth of these allegations is admitted, and a demurrer on the ground that the suit is not in the proper form cannot be sustained.

There is a minor point as regards the demurrer by *Shipstone* and *Mead*, and as to them it would have been better if the statement of claim had been more definite. They are stated to have been directors; it is not alleged in so many words, but must be taken to have been the case, that they were directors from the first. It is stated that the directors declared a dividend although no profits had been made. It is argued that they may have paid it out of their own pockets, and not out of the capital of the company, but that is not a natural reading of the statement. Then the 24th paragraph states that *Shipstone* and *Mead* have aided and abetted *Harris* in the acts hereinbefore mentioned. That refers to all the acts before-mentioned, and taking it most strictly against the pleader, it sufficiently refers to the declaration of a dividend. Then it goes on to allege that "they refuse to take any steps whatever with reference to such acts." There is enough alleged against them to make them at all events liable to the costs of the action, and their demurrer cannot be allowed.

(1) Law Rep. 9 Ch. 350.

C. A.
1879
MASON
v.
HARRIS.

JAMES, L.J. :—

I am of the same opinion. No Judge has ever laid down more strongly than I the rule that in general in these cases the company must be the Plaintiff. But an exception to that rule was established by *Atwool* v. *Merryweather* (1), and this case is within it.

It has been suggested that the Court has some means of directing a meeting to be called in which the corrupt shareholders shall not be able to vote. If the Court had any such power that mode of proceeding might furnish the best remedy in cases of this nature, but I cannot see how any directions for holding such a meeting could be given.

Mead and *Shipstone* are directors of the company, and are parties to the instrument which it is sought to set aside, and those circumstances alone might make them proper parties to the action. But there is also an allegation that they are aiding and abetting *Harris*, and their doing so is one reason why the action cannot be brought in the name of the company. I am, therefore, of opinion that their demurrer cannot be sustained.

BRAMWELL, L.J. :—

I am of the same opinion.

Solicitors: *W. Bohm; Richard Smith & Wilmer.*

In re HORBURY BRIDGE COAL, IRON, AND WAGGON COMPANY.

C. A.
1879
V.-C. B.
Feb. 7.
C. A.
March 5.

Company—Voting—Show of Hands—Poll.

The articles of a company provided that at any general meeting, unless a poll was demanded by at least two members, a declaration by the chairman that a resolution was carried, and an entry to that effect in the minute book, should be sufficient evidence of the fact; that if a poll was demanded it should be taken in such manner as the chairman should direct; that at any general meeting the chairman should be entitled to a second or casting vote; and that every member should have one vote for every share. At a meeting at which five members were present an extraordinary resolution to wind up the company was passed. *K.* was then proposed as liquidator, and an amendment was moved that *M.* should be appointed. Three of the five

(1) Law Rep. 5 Eq. 464, n.

C. A.

1879

In re HORBURY BRIDGE COAL, IRON, AND WAGGON COMPANY.

persons present voted for *M.*, the other two, holding a greater number of shares than the three, voted for *K.* A poll was not demanded:—

Held, by *Bacon*, V.C., that *K.* was duly elected.

Held, on appeal, that a poll not having been demanded, the voting was to be by show of hands, without counting shares, and that *M.*, therefore, was duly elected.

13 Ch D 21

THIS was a motion under the *Companies Act*, 1862, s. 138, by *John Masterman*, describing himself as the liquidator and one of the contributories of the *Horbury Bridge Coal, Iron, and Waggon Company*, and by several other contributories, to restrain *Wood* and *Kippax* from acting as liquidators or liquidator of the company, and from intermeddling with the assets, and particularly from conducting a sale of the property of the company, which had been advertised for the 24th of January, 1879, and that *Wood* and *Kippax* might be ordered to give up the books, documents, and property of the company to *Masterman*, as liquidator, and that the conduct of the Respondents might be examined into, and that they might be ordered to pay to the assets of the company such sum as the Court might think just by way of compensation for any loss sustained by the company in consequence of their acting as liquidators; and that if the Court was of opinion that *Masterman* was not duly appointed liquidator, then that a liquidator or liquidators might be appointed, and such meeting or meetings of the company directed to be held as the Court should think expedient.

The company was constituted under articles of association, among which were the following:—

"37. At any general meeting, unless a poll is demanded by at least two members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution.

"38. If a poll is demanded by two or more members, it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

"39. Every member shall have one vote for every share."

In January, 1879, the company being in difficulties, a meeting was held, which had been summoned for the purpose of passing an extraordinary resolution under the *Companies Act*, 1862, s. 129, that it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the same. At this time the total number of shareholders in the company was fourteen, and they held 266 shares, all fully paid up. Five shareholders only attended, and a resolution to the above effect was passed unanimously. The evidence as to what followed was somewhat conflicting, but what took place appeared substantially to be as follows: A motion was made and seconded that *Kippax* should be appointed liquidator. An amendment was moved that *Masterman* should be appointed. Three of the five persons present, holding together fifty shares, voted in favour of the amendment, the other two, holding together sixty-five shares, voted against it. The chairman then put the original motion. The two shareholders holding sixty-five shares voted for it, and the three holding fifty shares against it. The chairman decided that it was carried, and it was entered in the minute book.

It was admitted that a poll was not demanded, and that the voting took place by show of hands. It was, however, deposed to that the number of shares held by each person present had been counted. The evidence was directly conflicting as to what the practice of the company had been in cases where a poll was not demanded, it being asserted on one side that in all cases a majority was ascertained by reference to the number of shares held by the persons voting, and, on the other, that if a poll was not demanded the majority was ascertained simply by reference to the number of persons voting.

One of the two persons who voted for *Kippax* stated at the meeting that he held a proxy for another shareholder who was a holder of twenty shares, but it appeared that this proxy had not been lodged with the directors for forty-eight hours before the meeting, as required by the articles.

The proposed sale was impeached not only on the ground that *Kippax* was not duly appointed liquidator, but also on various grounds, which were alleged to render the sale improper even if

C. A. 1879

In re Horbury Bridge Coal, Iron, and Waggon Company.

he had authority to make it, but this part of the case does not appear to call for a report.

The motion was heard before Vice-Chancellor *Bacon* on the 7th of February, 1879.

Hemming, Q.C., and *Grosvenor Woods*, for the motion:—

The question is whether, when a poll is not demanded, the majority is to be ascertained by counting shares or counting hands. The point was raised in *MacDougall* v. *Gardiner* (1), but it became unnecessary to decide it. The case, therefore, is one of the first impression. Clauses 37, 38, and 39 of the articles appear to be the only ones that affect it. The course indicated by Article 38 is that, in the first instance, voting should be by show of hands, and the majority be ascertained by counting the voters. In ordinary cases no other mode of ascertaining a majority could be adopted. It is true that in the case of a meeting of five shareholders there would be no difficulty in counting the shares, but in general this would be a simple impossibility, and the Court cannot lay down a rule depending on the numbers attending a meeting. If any two shareholders are dissatisfied with a result depending simply on a majority of persons, they can demand a poll. Here a poll was not demanded, and we say that *Kippax*, having had only two votes for him and three against him, was not duly elected.

Sir *H. Jackson*, Q.C., and *W. Hatfield Green*, *contrà*, were not called upon as to this part of the case.

Bacon, V.C.:—

I do not think that there is any doubt as to the validity of the appointment of *Kippax*. I do not find anything in the clauses of the articles which have been referred to which can take the case out of the common rule. [His Lordship read Article 37.] In construing that clause we must consider whether the proper mode of voting is by heads or by shares. I am relieved from that by Article 39, which provides that every member shall have one vote for every share. It is not disputed that if the numbers of shares

(1) 1 Ch. D. 13.

held by the persons voting are counted the majority is in favour of *Kippax*.

The argument then proceeded on the other objections to the sale, and the Vice-Chancellor refused the motion, with costs.

The applicants appealed. The appeal was heard on the 19th of February.

Hemming, Q.C., and *Grosvenor Woods*, for the appeal:—

The Court, in deciding the question whether voting where a poll is not demanded is to be by number of persons or by number of shares, must have regard to the ordinary state of things at a public meeting. To vote by shares would, in ordinary cases, be simply impossible, and a different rule cannot be laid down in a particular case because by accident the number of persons is so small that the shares could without difficulty be counted in the room. Section 38, which says that the chairman shall have a second or casting vote, tends to shew that the voting must be by number of persons. Sects. 51 and 179 of the *Companies Act*, 1862, provide for the number of shares being regarded only when a poll is demanded. Nobody alleges that a poll was demanded in this case.

Sir *H. Jackson*, Q.C., and *W. Hatfield Green*, *contrà*:—

We agree that in a crowded meeting there must be a show of hands in which hands only are counted without regard to the number of shares; for the necessity of the case requires it.

[JESSEL, M.R.:—Where there is a mode of voting known to the community, that mode should be followed unless a binding rule to the contrary is shewn.]

Here we say that the articles do lay down a positive rule, and the evidence shews that the practice has been uniformly followed of voting by shares on all occasions. If a poll had been had, we should have been successful, so why should the resolution be upset?

[JESSEL, M.R.:—If a poll had been demanded the other shareholders might have voted.]

C. A. 1879

In re Horbury Bridge Coal, Iron, and Waggon Company.

By article 38 the poll is to be taken in such manner as the chairman directs; so he might have it taken then and there.

[Jessel, M.R. :—You are arguing on a clause taken with slight variations from Table A. to the Act, so that your contention applies to a vast mass of companies. That the number of shareholders here was so small is a mere accident. We must import into the case our common knowledge that where a poll is demanded it never is taken there and then, and I am by no means of opinion that a chairman could direct it to be so taken.

Brett, L.J. :—You will have some difficulty in persuading me that, if a poll is demanded, a chairman can appoint it to be held there and then without notice to anybody not present.]

We contend that according to the settled practice of the company the voting was by shares, and that all persons present understood that to be the case. The chairman's ruling is sufficient evidence that the resolution in favour of *Kippax* was carried.

[Jessel, M.R. :—Sufficient evidence in the absence of evidence to the contrary, but not conclusive evidence.]

Jessel, M.R :—

The only point upon which it is necessary for the present purpose to pronounce an opinion is, whether the liquidator, Mr. *Kippax*, was properly elected.

The facts are for this purpose beyond controversy. There were five persons present corporeally. One of the five held what was called a proxy, but it has been admitted, for the purpose of the argument, by the Respondents that that is not to be taken into account. Of the five persons present two only voted for Mr. *Kippax*. Three voted against him. The two who voted for him held more shares in the company than the three who voted against him, and according to the law of this company there was a vote for every share. No poll was demanded, and consequently no poll was taken.

The neat point is, whether the chairman was right in deciding that Mr. *Kippax* was duly elected because the two persons, including himself, who voted for Mr. *Kippax* held more shares in the company than the three who were against him. I think he was not.

We will first of all consider what may be termed the common law of the country as to voting at meetings. It is undoubted, and it was admitted by Sir *Henry Jackson* in his argument for the Respondents, that, according to such common law, votes at all meetings are taken by show of hands. Of course it may not always be a satisfactory mode—persons attending in large numbers may be small shareholders, and persons attending in small numbers may be large shareholders, and therefore in companies provision is made for taking a poll, and when a poll is taken the votes are to be counted according to the number of shares, in some cases according to the number of shares absolutely, as in this company, viz., a vote for every share, while in other companies there is another scale, and the number of votes increases, but not so rapidly as the number of shares, and there is a limit to the number of votes which a single shareholder can have.

Now, that being the common law mode of voting, is there anything in the *Companies Act* or in the articles of association which shews that any other mode is to be adopted; for in the absence of provision to the contrary the common law will prevail? So far from finding anything in the Act or the articles to the contrary, what little I do find on the subject confirms the view that the voting is to be taken by show of hands. First of all we have the 51st section of the Act, which says that a special resolution is to be passed by a majority of not less than three-fourths of such members entitled to vote as may be present in person or by proxy at any general meeting, and then the resolution is to be confirmed by a majority of such members as may be present in person or by proxy at a subsequent general meeting. Then it goes on, "At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried shall be deemed conclusive evidence of the fact." Then it provides that, "In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company." Therefore, in the case of a special meeting, there is a fair inference, I should say an irresistible inference, that what is to be done when a poll is demanded is not to be done when a poll is not demanded. Resolutions to wind up

C. A. 1879 *In re* HORBURY BRIDGE COAL, IRON, AND WAGGON COMPANY. Jessel, M.R.

have to be passed in the way in which special resolutions are to be passed, and therefore there is no repetition as to the way of voting. But in the 179th section, as pointed out by Lord Justice *Brett*, there is a reference to the mode of voting. It states the regulations as to registration of companies under Part VII. of the Act for which certain majorities are required, and then says, "In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the regulations of the company of which he is a member;" so that the same observation applies as in the 51st section. When we come to the schedule, Table A, the adoption of which is not compulsory, there is little information to be obtained from it, but what little there is tends the same way. Clause 42 provides that unless a poll is demanded a declaration by the chairman that a resolution has been carried, and an entry to that effect in the minute book, shall be sufficient evidence of the fact. Then the 43rd clause says, "If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote." This is not conclusive, but so far as it goes it confirms the conclusion to be drawn from the section to which I have referred. If that is so, and if there is a well-known common law rule on the subject, and if the statute is, taking the view most favourable to the Respondents, silent, taking the view less favourable to them, confirmatory of the common law rule, I think that the common law rule must be followed, and consequently this gentleman is not well elected.

As regards the articles of association, they do not vary the matter in the least. They are a mere copy of Table A in the schedule of the Act, except that they give to each shareholder one vote for every share without a scale. That clearly applies to the case where a poll is taken, and does not apply, in my opinion, where a poll is not taken.

BRAMWELL, L.J.:—

I am of the same opinion. First, a poll was not demanded, and

secondly, there was no waiver of a poll. The people who were there thought the vote was otherwise, and that they had elected their man. If all of them had said "There is no necessity to go through the form of demanding a poll or taking one, we know what the result will be," one would have done one's best to uphold it, but this is not the case. We cannot tell what the result of a poll might have been, because the other shareholders might have come. But that question does not arise, because Sir *Henry Jackson* has admitted the poll was neither demanded nor waived. I agree, therefore, with the conclusion come to.

BRETT, L.J.:—

I am of the same opinion.

The time for the rising of the Court having arrived, the case stood over for further argument on the question whether *Masterman* had been duly elected.

March 5. *Hemming*, Q.C., and *Grosvenor Woods*, for the Appellant:—

It is clear that the show of hands was in favour of *Masterman*, and it follows from what the Court has already decided that he was duly elected.

Hatfield Green, contrà:—

The evidence of the Appellants does not state that the amendment that *Masterman* should be appointed liquidator was seconded.

[JAMES, L.J.:—Is there any law of the land that at a meeting of shareholders a motion cannot be put unless it is seconded? I am not aware of any. No doubt it is the practice of the House of Commons.

JESSEL, M.R.:—And that practice is commonly followed at meetings.

Osborne Morgan, Q.C., *amicus curiæ*:—In the House of Commons every motion does not require to be seconded, and an amendment does not.

JESSEL, M.R.:—I think that the objection that the amendment

C. A. 1879

In re HORBURY BRIDGE COAL, IRON, AND WAGGON COMPANY.

was not seconded cannot prevail, it being admitted that it was put and voted upon.]

The meeting evidently was in great confusion; the deponents do not say who proposed *Masterman.*

[JAMES, L.J.:—In my opinion if the chairman put the question without its having been either proposed or seconded by anybody, that would be perfectly good.]

Then I say that the Appellants have no sufficient interest to entitle them to come to the Court; they are fully paid-up shareholders who are under no liability, and there is nothing to shew that there will be a surplus.

[JAMES, L.J.:—It has been already decided that they have a *locus standi.*]

A declaration was made by the Court (*Jessel,* M.R., and *James,* and *Bramwell,* L.JJ.) that *Kippax* was not duly appointed liquidator, and that *Masterman* was, and an order for handing over the books and papers, &c., to *Masterman;* the order to be without prejudice to any application under the *Companies Act,* 1862, s. 167, that part of the application not being pressed because the materials before the Court were not sufficient to enable it to make any order upon it.

Solicitors: *Learoyd, Learoyd, & Peace; Torr & Co.*

C. A. 1879

March 5.

NORTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1875 N. 13a.]

Practice—Appeal—Abandoned Notice of Appeal.

A final decree having been passed and entered on the 4th of December, the Defendant on the following day served notice of appeal for the 19th, but by mistake his solicitor did not set it down till the 19th. A few days afterwards the Plaintiff's solicitor informed the Defendant's solicitor that the appeal had not been set down in time, and stated that he should insist on the objection. The Appellant's solicitor then sent to the Plaintiff's solicitor a fresh notice of appeal, offering to pay the costs occasioned by the first and asking him to consent to the first entry of the appeal being struck out.

The Plaintiff's solicitor refused to comply with this request, and returned the second notice of appeal. The Defendant set down the second notice, and moved to have the first entry struck out, and to have the second notice and the entry of it treated as valid:—

Held, that the appeal must proceed on the second notice; and the applicant's costs were made costs in the appeal, no costs of the motion being given to the Plaintiff.

FINAL judgment in this action was given by Vice-Chancellor *Malins* on the 15th of July, 1878, and was passed and entered on the 4th of December. On the 5th of December the Defendants served notice of appeal for the 19th. Owing to the oversight of a clerk, who was not aware of the rule established by *In re National Funds Assurance Company* (1), that an appeal must be set down before the day mentioned in the notice of appeal for the hearing, this appeal was not set down till the 19th of December. In January, 1879, the Plaintiff's solicitors informed the Defendants' solicitor that the entry of the appeal was irregular, and that they should not waive any objection. The Plaintiff's solicitors persisting in this determination, the Defendants, on the 17th of February, served a fresh notice of appeal for the 3rd of March, their solicitor at the same time sending a letter to the Plaintiff's solicitors as follows:—

"In consequence of my clerk not having set down this appeal in the appeal list until after the expiration of the time allowed for that purpose by the General Orders, I herewith send you a fresh notice of appeal instead of the one served on you in December last, which you will be so good as to consider as withdrawn, and I shall feel obliged if you would send me in the course of to-morrow your consent to the erroneous entry of the appeal being struck out, to save me the expense of an application to the Court of Appeal on the subject. I am, of course, willing to pay you any costs you may be entitled to by reason of the service of the former notice."

On the 18th of February this fresh appeal was set down, and on the following day the Plaintiff's solicitors returned the notice, and declined to comply with the request in the letter of the Defendants' solicitor.

The Defendants thereupon gave notice of motion that they

(1) 4 Ch. D. 305.

C. A. 1879 NORTON v. LONDON AND NORTH WESTERN RAILWAY CO.

might be at liberty to withdraw their notice of appeal of the 5th of December, and that the entry of the 19th might be struck out, and that, notwithstanding the service of that notice and the entry of the appeal, the notice of appeal of the 17th of February, 1879, and the entry thereof might be treated as regular and valid; or that the Defendants might be at liberty to serve a fresh notice of appeal as if no previous notice had been given, and that in that case the entry of the 18th of February might be struck out.

Glasse, Q.C., and *Speed*, for the motion:—

The Plaintiff having taken a preliminary objection to the regularity of our proceedings, we are come to have it decided upon at the earliest stage. We say that if the setting down of the first notice of appeal was irregular, we must be at liberty to abandon that notice and give another.

J. Pearson, Q.C., and *Romer, contrà*:—

We contend that a succession of notices of appeal is not good; if it is held that an Appellant can abandon one notice and give another, there is nothing to prevent his giving a fresh notice of appeal every week.

[JESSEL, M.R.:—There is nothing in the Act of Parliament to prevent a party's giving a second notice within the time allowed for appealing.

JAMES, L.J.:—I think there is nothing to prevent a party from giving notice of appeal as often as he pleases. If he did so vexatiously we should know what to do; but when a blunder has been made, why should he not be allowed to correct it?]

If the second notice is good, there is no occasion for the present motion.

[JESSEL, M.R.:—You have objected to the second notice, and it is not unreasonable for the company to come at once to have a decision on your objection.]

We say that there is no right to withdraw a notice of appeal. The old petition of appeal could only be withdrawn by consent.

[JESSEL, M.R.:—If an appeal is not entered the Court treats it as an abandoned motion. That implies that the Appellant can

abandon it, and when a motion is abandoned a fresh notice can be given.]

It will be a very inconvenient rule that a party may set down as many notices of appeal as he pleases.

JESSEL, M.R.:—

We think that the appeal should proceed upon the second notice, which appears to be regular. I must say, so far as I am concerned, that I think the Respondents ought not to have objected; there was an offer to pay the costs occasioned by the mistake, which they could have accepted, and have let the matter go on without our being troubled with it, and as they have not done so we think the right thing will be to give no costs to the Respondents upon the present application, and to make the applicants' costs costs in the appeal.

JAMES and BRAMWELL, L.JJ., concurred.

Solicitors for Plaintiff: *Clarke, Woodcock, & Ryland.*
Solicitor for Company: *R. F. Roberts.*

LUKE *v.* SOUTH KENSINGTON HOTEL COMPANY.

[1875 L. 23.]

Practice—Pleading—Action for Foreclosure by one of several Mortgagees—Rules of Court, 1875, *Order* XVI., *r.* 13.

One of several mortgagees can maintain an action to foreclose the mortgage, making the others co-defendants if they are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs.

The act of a majority of trustees cannot bind a dissenting minority nor the trust estate. In order to bind the trust estate the act must be the act of all the trustees.

The decision of *Fry*, J., reversed.

THIS was an appeal from a judgment of Mr. Justice *Fry* (1).

The facts, which are stated in full detail in the previous report, were shortly as follows:—

The Plaintiff, *William Luke*, and the Defendants, *E. D. Browne*

(1) 7 Ch. D. 789.

See Parnell v. James, 7 Ves. 1 J.

C. A. 1879 — LUKE v. SOUTH KENSINGTON HOTEL COMPANY.

and *S. Sandys*, were the trustees of the will of Dr. *Luke*, the Plaintiff's father, who died in 1829; and in the year 1866 there were standing in their names as such trustees two sums of £7188 9*s.* 4*d.* and £753 2*s.* 2*d.* Reduced 3 per Cent. Annuities, and two sums of £2000 and £373 1*s.* 3*d.* New 3 per Cent. Annuities. Mrs. *Blakeley*, a granddaughter of the testator, was tenant for life of the sums of £7188 9*s.* 4*d.* and £2000, and also of one-fifth part of the two smaller sums. The Plaintiff was entitled to one-fifth of the two smaller sums, and the other three-fifths belonged to three of his brothers.

In May, 1864, the Plaintiff and the Defendants *Browne* and *Sandys* sold out those four sums of stock, and invested the proceeds, amounting to £9216 sterling, on the security of a second mortgage of leasehold property belonging to the *South Kensington Hotel Company*, which is hereinafter called for distinction the Old Company. This mortgage was dated the 23rd of May, 1864, and the interest payable under it was 6½ per cent., reducible to 5½ per cent. on punctual payment.

In the year 1869 the Old Company were in difficulties, and unable to pay the interest on their mortgages; and a new company was formed, who were the Defendants in the present suit, for the purpose of taking over their assets and liabilities; and, as part of the scheme of reconstruction, they proposed to the trustees of Dr. *Luke's* will to accept a composition of £5725 upon the mortgage debt of £9216, and to leave that sum on the security of the mortgaged property for a term of ten years, at 5 per cent. interest, reducible to 4 per cent. on punctual payment, the New Company covenanting for payment of the interest. The Defendants *Browne* and *Sandys* assented to this proposition, but the Plaintiff, who was then acting by a separate firm of solicitors, declined to assent.

However, the New Company proceeded as if the consent of all three trustees had been obtained. The Old Company was wound up, and, with the sanction of the Court, its assets were transferred to the New Company. A deed was prepared, bearing date the 24th of August, 1870, purporting to be made between the New Company of the one part, and the Plaintiff and the Defendants *Browne* and *Sandys* of the other part, by which the Plaintiff

and the Defendants *Browne* and *Sandys* were expressed to release the Old Company and the New Company and the mortgaged premises from all interest then due on the mortgage, and also from £3456, part of the principal sum of £9216. And the New Company covenanted to pay to the three trustees the sum of £5760 on the 1st of July, 1870, with interest at 5 per cent., and to pay interest at the same rate by half-yearly payments on so much of the sum of £5760 as should from time to time remain unpaid; with a provision for reduction of the interest to 4 per cent. on punctual payment.

This deed was executed by the New Company and the Defendants *Browne* and *Sandys*, but the Plaintiff refused to execute it.

On the 6th of February, 1875, the Plaintiff filed the bill in the present suit against the New Company, *C. N. Mayhew* (who held a third mortgage on the property), and *Browne* and *Sandys*. Mrs. *Blakeley* was made a co-Defendant, but none of the other *cestuis que trust* were made parties. The bill prayed a declaration that the deed of the 24th of August, 1870, was invalid and ineffectual, and ought to be delivered up to be cancelled, and prayed the usual foreclosure decree against the Defendants, under the original mortgage deed of the 23rd of May, 1864. No relief was prayed against the Defendants *Browne* and *Sandys*, or Mrs. *Blakeley*.

At the trial of the cause Mr. Justice *Fry* held, on the evidence, that the Plaintiff was not bound by the arrangement contained in the deed of the 24th of August, 1870, either originally or by reason of any subsequent conduct, but was of opinion that one of several co-mortgagees could not maintain an action to foreclose the mortgage, making the other co-mortgagees Defendants, unless they could be shewn to be colluding with the mortgagor; and he accordingly dismissed the bill with costs.

From this judgment the Plaintiff appealed.

Kekewich, Q.C., and *S. Dickinson*, for the Appellant:—

The Judge in the Court below was in our favour on the merits, but dismissed the action on the technical ground that one of three co-mortgagees could not maintain an action for foreclosure without joining the others as co-Plaintiffs. There is no foundation for

C. A. 1879 LUKE v. SOUTH KENSINGTON HOTEL COMPANY.

such a doctrine. It is a matter of ordinary practice for one of several trustees to bring an action respecting the trust property, making his co-trustees Defendants; and there is no distinction in principle between the case of trustees and mortgagees. The contrary practice would be most unreasonable, for it would prevent a joint mortgagee from obtaining any relief at all if any of his co-mortgagees have either refused to join or have done some act which prevents them from being Plaintiffs: *Wilkins* v. *Fry* (1).

North, Q.C., and *Rendall*, for the Defendants:—

There is no reported case in which one of several joint mortgagees has obtained a decree for foreclosure without joining the others as co-Plaintiffs. And if it could be done in any case, the present suit cannot be sustained. Even assuming that the Plaintiff is not bound by the deed of August, 1870, the other mortgagees are, and the effect of the deed is that at law the debt is released. If the whole transaction was a breach of trust on the part of the mortgagees, it is for the *cestuis que trust* to set it aside; that cannot be done in this suit. But we say that all parties are bound by the deed. The majority of the mortgagees executed the deed, and although the Plaintiff did not, he is bound by his acquiescence: *Bigg* v. *Strong* (2).

Fischer, Q.C., and *Millar*, for the Defendants the trustees.

Cookson, Q.C., and *Bush*, for Mrs. *Blakeley*.

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Fry*, who was entirely with the Plaintiff upon the merits, but dismissed the action on a technical point.

Now I certainly concur with the learned Judge in the conclusion to which he arrived as to the merits. The Plaintiff was one of three trustees who held a mortgage for a sum of £9216 on some freehold property. The company which was the mortgagor was, there being prior mortgagees, unable to pay the principal or

(1) 1 Mer. 244. (2) 3 Sm. & Giff. 592.

See Dancer v. James, 7 Hare 249

interest, and a proposition was made that the trustee mortgagees should take 12*s.* 6*d.* in the pound, and accept a new mortgage for that amount from a new company to be formed to take over the business of the old one. To that proposition a willing ear was lent, but it was never in fact agreed to, for the only letters on this subject which are in evidence preceded the formation of the new company, and when the new company was formed the solicitors of that company were informed that the Plaintiff, one of the three trustees, did not desire to come into the arrangement, and declined to do so by reason of his being a trustee, and not being able to obtain the consent of all his *cestuis que trust*. With this knowledge, two of the trustees, who, though they say they thought the Plaintiff would come in, had not ascertained it, execute the deed of composition, and the company also, and for some time afterwards the reduced amount of interest was received from the new company, in the ratio, I suppose, of 12*s.* 6*d.* in the pound. The Plaintiff then brings this suit to foreclose the mortgage, and he insists that the original mortgage is unaffected, because he never agreed to release it, and that the consent of his co-trustees did not bind him for two reasons. In the first instance any consent of the two was only conditional on the third agreeing also—indeed the form of the indenture shews it. It recites an agreement by the three which was intended to be carried out. It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute, and consequently on that ground the deed could not have bound the two. Then it was suggested that the two not having dissented in sufficient time would still be bound, having acted on the deed. To that it was answered that the two were trustees as well as the one, and that they had no power to bind the *cestuis que trust* by such an arrangement. All three together might or might not; that depends upon the nature of the arrangement. It is not every agreement for a composition, or to accept less than the full amount, that is a breach of trust. But two out of three trustees have no power to bind *cestuis que trust*. There is no law that I am acquainted with which enables the majority of trustees to bind the

C. A. 1879 LUKE v. SOUTH KENSINGTON HOTEL COMPANY. Jessel, M.R.

minority. The only power to bind is the act of the three, and consequently the act of the two, even if it could bind them by reason of delay or acquiescence, could not bind the trust estate, and therefore in no way was the trust estate bound or the mortgage released.

So far I am of opinion with the learned Judge. But he dismissed the action on this ground: he said that it was an action for foreclosure by one of three mortgagees, making the other two defendants, and that such an action could not be maintained. Now I must say that I should have thought the law was quite settled the other way. It is very difficult to find authorities exactly in point. I recollect one very strongly in point. It was the case of *Fowler* v. *Wyatt* (1), which was a suit to set aside a release of an equity of redemption and to redeem. *Fowler* became bankrupt. He had two assignees, one the trade assignee, and the other the official assignee. The official assigneee, being afraid of the cost of the litigation, declined to join as plaintiff, and the trade assignee alone revived. That was objected to first at the Rolls, where the Master of the Rolls overruled the objection, on the ground that one of two trustees acting in bankruptcy could maintain a suit to redeem. It was appealed to Lord *Cranworth*, then Lord Chancellor, who affirmed the decision, and the suit afterwards came on for hearing. There is another case, the well-known case of *Adams* v. *Paynter* (2). Two trustees there filed a bill to foreclose. It was objected that the third trustee had not been discharged and should have joined them. How? The objection was that he was not made a party, and the objection was allowed, and he was made a party as defendant. They did not add plaintiffs in those days, and therefore that was considered sufficient. And on general principles I cannot see why this should not be done. It is quite familiar to us in equity for two trustees to file a bill to recover the trust estate, and if the third trustee has been implicated at all in the loss of it, to make that one trustee a defendant, although you order the trust fund to be restored to all for the benefit of the *cestuis que trust*. I cannot see any reason for altering what I consider the settled rule.

(1) 24 Beav. 232, not reported on this point. (2) 1 Coll. 530.

As regards the reasons given by the learned Judge in the Court below, it appears to me that they are not well founded. He says (1): "Take the case with which we are very familiar, of a mortgage for a large sum of money made to half a dozen persons as trustees for an insurance company, the name of the company not appearing on the face of the deed. You might have six foreclosure actions, one brought by each of the mortgagees against the mortgagor, naming the other five as defendants on the record." But five of such actions would assuredly be stopped, because the Court would tell the plaintiffs in them that they must shew some good reason for not joining the others as plaintiffs, and if the Court found all the other five were willing to be made plaintiffs, it would stop the other actions. There would be no difficulty in dealing with the case if it occurred. You have no right capriciously to make persons defendants when they ought to be plaintiffs, and thus increase the costs of the other defendants. There must be some substantial ground for it, and when there is a substantial ground you make all parties to the suit some plaintiffs and others defendants, and the evil which the learned Judge thought would arise cannot arise.

Then it is said that some of the mortgagees might not wish to foreclose, and others might. We will deal with that case when it arises, as to whether one without the consent or against the wish of the others can foreclose. That is not the case here. The other two Defendants do not oppose the foreclosure. They were not willing to be Plaintiffs, but they do not refuse to foreclose. If two out of three trustees should decline to foreclose, or to agree to any other remedy, it might be a reason for removing them from being trustees; but that is not the case here, and we have not, therefore, to consider that case, which may be dealt with when it arises. It appears to me that there is no ground whatever for preventing the Plaintiff from obtaining the relief he asks, and that there is ground for maintaining this action. If it is not maintained, I do not see how he can by any possibility obtain the relief to which he is entitled. For these reasons I think the appeal ought to be allowed, and judgment ought to be given for foreclosure.

(1) 7 Ch. D. 798.

C. A. 1879 LUKE v. SOUTH KENSINGTON HOTEL COMPANY.

JAMES, L.J.:—

I am entirely of the same opinion. Upon the facts of this case I am quite satisfied that no binding agreement was ever entered into by anybody to reduce the amount of the mortgage money either as principal or interest, but that the company went on expecting the thing would be done and bought the property with that expectation, but without taking care to have a binding agreement. That was their misfortune or their imprudence. They may have been misled, or they may have misled themselves, and they may have hoped and expected until they had gone too far. But they got the property subject to a mortgage which retained its original validity and amount. That was their position. And then beyond all question the mortgage money was part of the trust estate. Two of the trustees have so dealt with the matter as to make it an embarrassment for them to be made co-plaintiffs, and it always appeared to me to be an established rule of the old Court of Chancery, that if there were three trustees who were trustees having a common right, two of whom had done something which might probably have prohibited them from going to law, the one who had not done anything to prejudice himself, or to prejudice his right of action, might be sole plaintiff, making the others defendants, in order that they might be present at the litigation, and concur in everything necessary for them to concur in. I remember a case in which there were three mortgagees holding a joint mortgage. Two of them on their separate account became mortgagees of the second and third mortgages of the equity of redemption. In that case it was absolutely impossible for the three to join as plaintiffs in the suit, because they were both mortgagees and mortgagors. That difficulty was avoided by one mortgagee, filing his bill on behalf of the trust estate, making the others interested in the equity of redemption defendants. In the old Chancery practice there was this difficulty, that the misjoinder of plaintiffs was fatal, and if you had any one person among the plaintiffs who had done anything which might have amounted in equity to a release of his right the whole suit failed, and there was no remedy for it, and therefore, as a general rule, you selected, if you could, one person as plaintiff whom you knew to be free from any charge or imputation on his conduct, and made all the others

defendants. There never was any objection to that in practice. Now that is rendered unnecessary by the fact that the Courts may deal with misjoinder of plaintiffs according to the justice and equity of the case.

C. A. 1879 LUKE v. SOUTH KENSINGTON HOTEL COMPANY.

BRAMWELL, L.J., concurred.

Solicitors: *Janson, Cobb, & Pearson*; *Mayhew, Salmon, & Whiting*; *Sandys & Trevenen*; *W. & A. Ranken Ford.*

KUSEL *v.* WATSON.

[1877 K. 48.]

C. A. 1878 V.-C. B. *May* 22. C. A. 1879 *March* 10.

Specific Performance—Lease—Agreement to underlet—Agreement to let the Tenant have a Lease at any Period he may feel disposed; and "not to molest or disturb or raise the Rent of" the Tenant after his having laid out Money in Improvements.

G. S., a lessee of a house for a term of eighty years, which had fifty-nine years to run, agreed to let the same to *R. K.* at a fixed rent. The duration of the underlease was not specified; but the agreement went on to say that *G. S.* agreed to let *R. K.* have a lease at the same rent "at any period he may feel disposed;" and further agreed "not to molest, disturb, or raise the rent of" *R. K.* "after his having laid out money in improving the said premises." *R. K.* did not at the time of the agreement know the nature of the interest of *G. S.* in the property.

R. K. having gone into and remained in possession, and having laid out money in improving the premises, and the lease having over twenty years to run:—

Held, by *Bacon*, V.C., that *R. K.* was entitled to an underlease for the whole of the residue of the term, less one day.

Held, on appeal, by *Jessel*, M.R. and *Bramwell*, L.J., *dubitante Baggallay*, L.J., that he was entitled only to an underlease for the residue of the term less one day, if he should so long live.

ON the 24th of June, 1839, *George Self*, being owner of a lease of a house, then called No. 20, *Nassau Place*, and now No. 200, *Commercial Road, Middlesex*, for a term of eighty years expiring at Midsummer, 1898, entered into an agreement in the following terms:—

"The said *George Self* agrees to let and the said *Richard Kusel*

C. A. 1879 KUSEL v. WATSON.

agrees to take a certain house and shop situate and being No. 20, *Nassau Place, Commercial Road*, at and for the yearly rent or sum of £26 per annum, payable quarterly; the tenant paying all taxes, sewers rate, &c.

"And the aforesaid *George Self* agrees to let the aforesaid *Richard Kusel* have a lease of the said premises at and for the yearly rent or sum of £26, with all taxes, &c., at any period he may feel disposed; and hereby further agrees not to molest, disturb, or raise the rent of the said *Richard Kusel* after his having laid out money in improving the said premises."

It did not appear that at the time when this agreement was entered into *Kusel* knew anything about the nature of *Self's* interest in the property.

Under this agreement the Plaintiff, *Richard Kusel*, entered into possession, and had so remained ever since. He had laid out upwards of £150 in improving the premises.

The Defendant, *Thomas Rouse Watson*, who was legal personal representative of *George Self*, advertised, and on the 22nd of December, 1876, put the premises up for sale, omitting from the particulars all mention of any interest or claim on behalf of the Plaintiff. The Plaintiff thereupon gave notice of his claim to the Defendant. At the sale the Plaintiff became the purchaser, but, owing to objections taken by him to the title, the Defendant rescinded the contract, and gave the Plaintiff notice to quit, threatening proceedings in default of his giving up possession.

Thereupon the Plaintiff demanded a lease in accordance with the terms of the agreement, but the Defendant refused; whereupon the Plaintiff commenced this action, in which he claimed specific performance of the agreement of the 24th of June, 1839; and an injunction to restrain the Defendant from molesting or disturbing the Plaintiff.

The action came on upon motion for judgment, and was heard before Vice-Chancellor *Bacon* on the 22nd of May, 1878.

Rigby, for the Plaintiff:—

We ask for an underlease of the premises for the whole of the Defendant's remaining term therein, less one day, at the rent of £26, free of rates and taxes. Our right to this follows from the

agreement on the part of the Defendant to let us have a lease "at any period" we "may feel disposed," followed by the agreement not to molest, disturb, or raise the rent, after (which has happened) we have laid out money in improving the premises: *In re King's Leasehold Estates* (1).

No limit of time was stipulated for within which we were to make our demand; and we have been in possession since the date of the agreement: *Hersey* v. *Giblett* (2); *Moss* v. *Barton* (3).

Sir *H. Jackson*, Q.C., and *R. K. Hervey*, for the Defendant:—

The Plaintiff is entitled, if he likes, to have the agreement, just as it stands, put into a lease, which will give him only a tenancy from year to year.

Or he is entitled to treat the former part of the agreement as a present demise from year to year, coupled with an executory agreement to do something, which from its vagueness cannot be performed. The second or executory part of the agreement makes no mention of any term. If *Self* had been an owner in fee, the Plaintiff would, according to his own construction, be entitled to ask for a lease for 999 years. This is an extravagant and unreasonable demand: *Doe* d. *Warner* v. *Browne* (4); *Wood* v. *Beard* (5); *Fitzmaurice* v. *Bayley* (6).

BACON, V.C.:—

This agreement is in very plain language—it is not difficult to construe—and the construction is the only question which I have to decide in the action.

The statement of claim states this fact, that the Defendant's predecessor in title held a lease of this house for a term of eighty years, expiring at Midsummer, 1898. I must read the agreement with reference to that fact, which I must consider as admitted and proved in the action.

This, then, is an agreement by a lessee of a term which had fifty-nine years to run, to grant to the Plaintiff a lease from year

(1) Law Rep. 16 Eq. 521.
(2) 18 Beav. 174.
(3) Law Rep. 1 Eq. 474.
(4) 8 East, 165; S. C. *Browne* v. *Warner*, 14 Ves. 156, 409.
(5) 2 Ex. D. 30.
(6) 9 H.L. C. 78.

C. A. 1879 KUSEL v. WATSON. V.-C. B.

to year at a fixed rent; and so far the agreement is plain. But then the lessor enters into a further stipulation that he will let the Plaintiff have "a lease of the said premises at or for" the same yearly rent "at any period he may feel disposed, and hereby further agrees not to molest, disturb, or raise the rent of" the Plaintiff, "after his having laid out money in improving the said premises." Then it appears that this condition has been complied with. The Plaintiff says, and his statement is not denied, that he "has laid out a considerable sum of money, that is to say, upwards of £150, in improving" the premises—and I am asked to say that this is not an agreement which this Court is bound to enforce.

The case of *Browne* v. *Warner* (1), which has been referred to, before Lord *Eldon*, was very different from this. All that Lord *Eldon* decided there was, that the agreement was one which the Court was not then in a position to put a judicial construction upon. Enough was stated to shew that the Plaintiff had a right to be protected from the action at law. Upon demurrer it was held that there was a case for an injunction; there being nothing to shew that the Plaintiff might not possibly succeed at the hearing.

The case of *In re King's Leasehold Estates* (2) was very much like this. I adopt the reasoning of the Vice-Chancellor in that judgment; and if that case was rightly decided, as I think it was, I can find no material difference in principle between the result that was there arrived at and the conclusion to be arrived at here.

The case of *Wood* v. *Beard* (3) was very different. The judgment there went plainly upon the ground that the Court, which had only the legal point before it, and was not asked to decree specific performance, there being no counter-claim, found such an uncertainty in one of the clauses of the agreement as made it impossible to give effect to it.

But I find no difficulty or vagueness in the present case. I must take it that *George Self* had power to grant a lease for the residue of the term of eighty years; and in the terms of the agreement I cannot perceive any ambiguity such as that which was remarked upon in the judgment in the Court of Exchequer. If I

(1) 14 Ves. 156, 409. (2) Law Rep. 16 Eq. 521.
(3) 2 Ex. D. 30.

had found any such vagueness here as was noticed there, I should have been bound to decide accordingly. Sir *H. Jackson* says that the agreement is so obscure that a conveyancing counsel would be unable to frame a lease upon it. I do not perceive any such difficulty. The conveyancing counsel would examine the abstract of title of *George Self;* he would find that *George Self* contracted to grant an underlease; and it would be his duty to frame such an underlease, omitting the last day of the term, and containing the ordinary covenants.

C. A. 1879 KUSEL v. WATSON. V.-C. B.

There must be a declaration that the Plaintiff is entitled to have an underlease for the whole of the Defendant's term, less one day; the underlease to be settled in Chambers if the parties differ; and the Plaintiff must have his costs of the motion.

The Defendant appealed. The appeal was heard on the 10th of March, 1879.

C. A.

Sir *H. Jackson*, Q.C., and *Ingle Joyce*, for the Appellant:—

The agreement is too vague to be enforced.

[JESSEL, M.R.:—May it not mean that the landlord is to grant as long a term as he can?]

It is not alleged that the tenant knew the nature of the lessor's interest, so regard cannot be had to that; and if he was owner in fee, that principle would bind him to grant a lease for 999 years, which cannot be what the parties intended in the case of a lease of a house at a rack rent. The terms are so loose that they might denote a seven, fourteen, or twenty-one years' lease, which is the ordinary thing, or a lease during *Kusel's* life, or a legal tenancy from year to year.

[BAGGALLAY, L.J.:—The provision that the tenant shall not be disturbed or his rent raised is inconsistent with a yearly tenancy.]

In *Browne* v. *Warner* (1) Lord *Eldon* thought that there was a minute equity sufficient to sustain the bill; but there the agreement was not so indefinite as here. If we stop at the words "feel disposed," there is no agreement which the Court can execute, no

(1) 14 Ves. 156.

C. A. 1879 KUSEL v. WATSON.

term being mentioned: *Fitzmaurice* v. *Bayley* (1). The subsequent clause is personal to the parties and cannot last beyond their joint lives. In *Browne* v. *Warner* (2) and *In re King's Leasehold Estates* (3) both parties were alive.

Rigby, contrà:—

The interest cannot be cut down to less than the residue of the term or the life of the lessee, whichever is shortest. The Plaintiff is willing to accept that.

Sir *H. Jackson*, in reply.

In answer to the Court the Plaintiff's counsel did not object to a lease for the residue of the term less one day, if the Plaintiff should so long live.

JESSEL, M.R.:—

The agreement in this case is a document not easy to construe, and one on which it is not surprising that there should be a difference of opinion. I differ from the opinion of the Vice-Chancellor, but without feeling any confidence that I am right and that he is wrong.

Self had a lease for a term of eighty years, expiring in 1898; but it does not appear that this fact was known to the Plaintiff, and we, therefore, cannot take it into account in construing the agreement, though we might take it into account if *Self* had been asking for specific performance. It appears to me to be clear from the last clause of the agreement that the Plaintiff was to have something more than a tenancy from year to year. I think it also clear that the agreement not to disturb the Plaintiff cannot be confined to the life of the landlord. The parties cannot have intended that after he had laid out money he might be disturbed if the landlord had died in the next year. We must construe the clause as meaning that the tenant is not to be disturbed. It cannot mean that he is not to be disturbed after he has got a lease, for he could not then be disturbed; it must mean that he is

(1) 9 H. L. C. 78. (2) 14 Ves. 156.
(3) Law Rep. 16 Eq. 521.

to have a lease, and that in the meantime he is not to be disturbed. I think then that the fair construction is, that the Plaintiff is to keep the property for his life if so minded. The question then is, what is to be done if the landlord has not such an interest as to enable him to grant a lease of that nature? I think that we must carry it into effect so far as the landlord's interest admits, by directing a lease for the residue of the term less one day, if the Plaintiff shall so long live.

BAGGALLAY, L.J.:—

As the Plaintiff does not object to a lease in the form proposed by the Master of the Rolls, it is unnecessary to consider whether he is entitled to more, but I incline to the view that the judgment of the Vice-Chancellor was correct.

BRAMWELL, L.J.:—

I agree with the view of the Master of the Rolls. Construing this agreement is rather guesswork. Probably the parties had no definite idea what they intended, and perhaps they did not both mean the same thing. Still I think we can put a meaning on the terms they have used. I do not think it much matters whether the clause as to expenditure refers to past or future expenditure, for though past expenditure would not be a valuable consideration, there is consideration for this agreement without it. I am disposed to think that the agreement not to molest, disturb, or raise the rent of the Plaintiff applies till the lease is executed. This then gives the tenant an agreement which, though it would not prevent his tenancy being determined, would give him a right of action if the landlord determined it. The tenant would go on as tenant from year to year, and would be at liberty to give notice to quit, but the landlord undertakes not to turn him out. Then the agreement provides that the tenant may come at any future time and apply for a lease. What kind of lease? The proper legal meaning of the term is a lease for the life of the tenant, and I think that the meaning the law puts on the words is a reasonable one. The parties probably did not think about the precise meaning of their words, but they must have considered that the tenant

C. A. 1879 KUSEL v. WATSON.

was not to be turned out during his life. It is true that the landlord cannot grant a lease for the tenant's life, but that was not known to the tenant, and so cannot modify the construction of the agreement. The Court will not decree the landlord to grant a lease which he has no power to grant, and the proper form of order will, therefore, be that suggested by the Master of the Rolls.

Solicitors: *Druce, Sons, & Jackson; T. R. Watson.*

C. A. 1879 V.-C. B. *March* 13. C. A. *March* 19.

ADAIR *v.* YOUNG.

[1877 A. 153.]

Practice—Stay of Proceedings pending Appeal—Account—Infringement of Patent—Costs of Application to Stay.

In an action by a patentee to restrain alleged infringements of letters patent for the manufacture of pumps, a judgment was made granting a perpetual injunction against the Defendants, who were pump manufacturers, and directing an account of the profits made by them by the sale of pumps made in infringement of the letters patent. The Defendants forthwith gave notice of appeal, and set the appeal down for hearing, and then applied to stay proceedings under the account till the appeal was heard. This application was refused by *Bacon*, V.C.:—

Held, that as the discovery given by the account would enable the Plaintiff to take proceedings against the customers of the Defendants, and the Defendants, supposing them to be ultimately successful, might thus sustain irreparable injury in their business, the appeal ought to be advanced, and proceedings under the account stayed till the hearing.

Costs of the application made costs in the appeal.

Merry v. *Nickalls* (1) distinguished.

THIS was an action to restrain the infringement of the Plaintiff's patent for the manufacture of ships' pumps. The action was originally only against *Young*, the captain of a ship, in which a set of pumps, alleged to be an infringement of the patent, was used; but *Wallace & Co.*, the makers, were added as Defendants during the course of the action. Judgment was given by Vice-Chancellor *Bacon* in favour of the Plaintiff on the 5th of February, 1879, granting an injunction to restrain *Wallace & Co.*, during the

(1) Law Rep. 8 Ch. 205.

continuance of the patent, from making or selling pumps similar to or only colourably differing from those invented by the Plaintiff, and directing an account as follows:—

"And it is ordered that an account be taken of all pumps being the same as the pumps used by the Defendant *J. M. Young* as aforesaid, or otherwise made in infringement of the said letters patent, which have been manufactured or sold or used by or by the order or for the benefit of the Defendants *R. C. Wallace*, *R. Wallace*, and *H. C. Wallace*, or any of them, and also of the gains and profits made by the same Defendants by reason of such manufacture, sale, or use. And it is ordered that the Defendants *R. C. Wallace*, *R. Wallace*, and *H. C. Wallace*, do, within one month after the date of the Chief Clerk's certificate, pay to the Plaintiff, *Wm. Adair*, what shall be certified to be the amount of such gains and profits." A counter-claim by *Wallace & Co.* was dismissed, and they were ordered to pay the Plaintiff his costs of the action, and his costs occasioned by the counter-claim.

On the 21st of February *Wallace & Co.* served notice of appeal, and forthwith set it down for hearing. They then gave notice of motion that all proceedings under the judgment might be stayed till the hearing of the appeal.

Young also gave a notice to stay proceedings on the judgment against him which the Vice-Chancellor granted on his undertaking not to use the pumps held to be an infringement of the patent.

The motion was heard before Vice-Chancellor *Bacon* on the 13th of March, 1879.

Aston, Q.C., and *McClymont*, for the Defendants, referred to *Bridson* v. *Benecke* (1), and to Order LVIII., rule 16, of the Rules of Court, 1875, as shewing that it was intended that the Court should exercise a discretion in staying execution when the appeal was, as in this case, about to be prosecuted *bonâ fide*.

Chadwyck Healey, for the Plaintiff, was not called upon.

BACON, V.C.:—

It seems to me that Mr. *Aston*, in making this application, has

(1) 12 Beav. 1.

C. A. 1879 ADAIR v. YOUNG. V.-C. B.

mixed up two things, the order for an account against the Defendants *Wallace & Co.*, and the order for an injunction against *Young*, the captain.

I inquired whether the Defendant *Young* would give an undertaking not to use the articles, the use of which has been held to be an infringement of the patent right, and to that he acceded, so that the motion, so far as *Young* is concerned, is wholly disposed of.

But then Mr. *Aston* has a separate motion. His intention, I have no doubt whatever, is to prosecute the appeal earnestly, and as rapidly as the course of proceeding of the Court will allow; and what he asks is that the direction for taking the account should be suspended pending the appeal. I will not say that I never heard of such an application, for I have heard many such; but I may certainly say I never heard of such an application succeeding. To grant such an application would be impliedly to say that I entertained some doubt as to the conclusion which has been arrived at. I entertain no such doubt. If the Plaintiff should ultimately fail, and any costs should have been incurred by the Defendants in consequence of the Plaintiff's proceedings, he will have to pay those costs. It has been said that the taking of the account will be a source of inconvenience to the Defendants. But no inconvenience to a Defendant can be allowed to stand between a Plaintiff and the right which he has established.

I can see no reason for granting this application, nor any ground for suspending the operation of the judgment; and the result is that I must refuse this motion with costs.

C. A.

The motion was renewed before the Court of Appeal on the 19th of March.

McClymont, for the Appellants:—

The application is based on three grounds: 1, that taking the account will do the Appellants irreparable injury. The Plaintiff will discover the name of every customer to whom *Wallace & Co.* have sold one of their pumps; they will be called upon by the Plaintiff to make a payment to him with a threat of an action in default of payment; and if the Messrs. *Wallace* are successful in

their appeal their business will nevertheless in the meantime have been ruined.

[He was here stopped by the Court.]

Chadwyck Healey, for the Plaintiff:—

I submit that it is without precedent to stay proceedings under a decree for an account because an appeal is pending.

JESSEL, M.R.:—

If the Plaintiff by means of the account learns the names of all the customers of Messrs. *Wallace & Co.*, there can be little doubt that, as is usual in such cases, he will at once commence proceedings against them, and there is danger that the Defendants, if ultimately successful, may find that in the meantime their business has been ruined. At the same time it is not reasonable that the Plaintiff, who may prove ultimately to be in the right, should be delayed for a long period in taking the account. I am of opinion that the right course will be to advance the appeal to the first day for hearing appeals after the Easter Vacation, and to stay all proceedings under the account until that time. As the Plaintiff obtains a benefit by this order, I think it will be reasonable that the costs of this application should be costs in the appeal, notwithstanding the general rule in *Merry* v. *Nickalls* (1).

BAGGALLAY and BRAMWELL, L.JJ., concurred.

Solicitors: *Morten & Cutler; W. W. Wynne.*

(1) Law Rep. 8 Ch. 205.

C. A.
1878
M. R.
May 25.
C. A.
1879
March 21.

In re LONDON AND CALEDONIAN MARINE INSURANCE COMPANY.

Company—Voluntary Winding-up—Dissolution of Company—Companies Act, 1862, *ss.* 142, 143.

The Court has no jurisdiction to make an order for winding up a company which has been voluntarily wound up and dissolved under the 142nd and 143rd sections of the *Companies Act*, 1862, unless the dissolution can be impeached on the ground of fraud.

THE *London and Caledonian Marine Insurance Company* insured the cargo of the ship *Isabel* to the extent of £2700. Other insurances were made by other underwriters, the total insurances effected on the cargo being £29,142. On the 5th of August, 1866, the ship was lost under circumstances which induced the underwriters, including the above-named company, to refuse to pay the insurance; and they instituted proceedings in the Courts in *Havana* to have the policies set aside as fraudulent.

The *Association for the Protection of Commercial Interests in respect of Wrecked and Damaged Property*, who were the Petitioners in this case, undertook to conduct the proceedings on behalf of the underwriters, and the above-named company gave them an undertaking to bear their share of the costs and expenses.

The proceedings turned out to be very lengthy and expensive, and were not yet terminated, and the Petitioners incurred considerable costs, amounting altogether to more than £8700; besides which they were liable to a claim by their agent at *Havana* for commission, the amount of which was disputed. In August, 1866, the company paid the Petitioners £94 10*s.* on account of their proportion of the costs then incurred.

On the 9th of April, 1868, the company passed a special resolution, which was duly confirmed, for a voluntary winding-up, and three liquidators were appointed.

In February, 1873, the liquidators paid the Petitioners a further sum of £94 10*s.*, on account of their share of the costs of the litigation. The Petitioners alleged that the sum still remain-

ing due from the company for their proportion of the expenses of the litigation was £618. The liquidators stated in their affidavit that at the time of paying the last-mentioned sum of £94 10*s.* they thought that it was a final payment, and did not know that the Petitioners had any further claim upon the company.

On the 2nd of September, 1875, a meeting of the contributories was held, at which a resolution was unanimously passed, that the liquidators should be empowered to take and set apart £3362 17*s.* 9*d.* for the purpose, during the existence of the company, of paying such claims and liabilities as might be presented and allowed, and if any balance should remain, then for the purpose of remunerating the liquidators for their services to the end of the liquidation.

On the 5th of February, 1876, a general meeting of the company was held in pursuance of the 142nd section of the *Companies Act*, 1862, for the purpose of passing the final accounts of the liquidators, at which a resolution was passed adopting and confirming the balance-sheet and accounts; and on the 10th of February a report of the meeting was made to the Registrar of Joint Stock Companies.

The liquidators stated that at that time they did not know of any proceedings being prosecuted in the Court of *Havana* with regard to the claim of the *Isabel*, and that they had received no claim from the Petitioners.

In January, 1878, the Petitioners applied to the liquidators for a further payment on account of the costs of the litigation in *Havana*, and were then informed that the liquidation was closed, the company no longer in existence; of which fact, as they alleged, they were previously ignorant. They accordingly filed the present petition on the 15th of April, 1878, asking that the company might be wound up by the order of the Court.

The petition was heard before the Master of the Rolls on the 25th of March, 1878.

Chitty, Q.C., and *Millar*, for the Petitioners, referred to the recent decision of the Court of Appeal in *In re Pinto Silver Mining Company* (1), and contended that, notwithstanding the time that

(1) 8 Ch. D. 273.

C. A. 1879 *In re* LONDON AND CALEDONIAN MARINE INSURANCE COMPANY.

had elapsed since the dissolution of the company, the Court had jurisdiction to entertain the petition, inasmuch as it contained allegations which in substance impeached the dissolution, on the ground at least of equitable fraud.

Davey, Q.C., and *H. B. Buckley*, for the liquidator, submitted that there was no sufficient allegation of fraud to give the Court jurisdiction, and relied on the above decision and on sections 142 and 143 of the *Companies Act*, 1862.

JESSEL, M.R., held that the petition was not one in any way impeaching the dissolution of the company on the ground of fraud, and that he therefore felt himself bound by the decision of the Court of Appeal in *In re Pinto Silver Mining Company* (1), which he considered precisely in point, to dismiss the petition, which he accordingly did, with costs.

From this decision the Petitioner appealed. The appeal was heard on the 21st of March, 1879.

Chitty, Q.C., and *Millar*, for the Appellants:—

The Master of the Rolls decided the case on the authority of *In re Pinto Silver Mining Company*, but the Court rested its judgment in that case on the acquiescence of the petitioner in the dissolution, and it was not necessary to decide the question of jurisdiction. The 142nd section of the *Companies Act*, 1862, says that "As soon as the affairs of the company are fully wound up, the liquidators shall make up an account shewing the manner in which such winding-up has been conducted and the property of the company disposed of." It is therefore a condition precedent to the dissolution that the affairs of the company have been fully wound up. It cannot be said that this has been done while a debt of which the company had notice is still unsatisfied. Nor can the property of the company be said to have been disposed of when, as here, a large sum has been left in the hands of the liquidators to meet future claims: *In re Westbourne Grove Drapery Company* (2); *In re Crookhaven Mining Company* (3); *In re Haytor*

(1) 8 Ch. D. 273. (2) 5 Ch. D. 248.

(3) Law Rep. 3 Eq. 69.

Granite Company (1); *Buckley* on the Companies Acts (2). If it is necessary to make out a case of fraud in effecting the dissolution, it is fraud, in the legal sense, to attempt, by using the machinery of a dissolution, to get rid of a debt of which the liquidators had notice.

Davey, Q.C., and *Buckley*, for the liquidators, were not called on.

JAMES, L.J.:—

I have considered this case, and it seems to me that in all respects it is governed by the decision of this Court in *In re Pinto Silver Mining Company* (3).

Of course, when a question has been decided by the Court once it ought not to be re-argued on immaterial distinctions which practically make no more difference to the real subject-matter of the decision than the name of the parties to the suit; and what was decided in the case to which I have referred was, that we could not put upon these words, "as soon as the affairs of the company are fully wound up," the construction contended for, namely, to make that a condition precedent and construe it to mean that everything had been done which was to be done. We are of opinion that those words could not mean that if there were a single asset outstanding or a single debt unpaid, the affairs of the company were not to be considered as wound up.

Take the case of an insolvent company, insolvent because there were contributories at that time insolvent who had not paid their calls; or suppose there had been judgment against a hundred contributories recovered, and a return made by the sheriff that they had no assets and that he could not levy the amount of the judgment, could it be said that so long as a thing of that kind continued the company could not be fully wound up? Or suppose an outstanding liability under a lease, under the covenants in which the company might be liable any number of years afterwards, could not the company be fully wound up? We must put some practical and sensible meaning on the words, and in my opinion they mean "as far as the liquidators can wind them up;"

(1) Law Rep. 1 Ch. 77, 80. (2) 3rd Ed. p. 265.
(3) 8 Ch. D. 273.

C. A. 1879 *In re* London and Caledonian Marine Insurance Company.

that is, when the liquidator has done all that he can to wind up the company, when he has disposed of the assets as far as he can realize them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding up the affairs, so that he has completed his business so far as he can, and is *functus officio*. Then it is his duty to call a meeting, to give in his account of the affairs of the company, and to make a return to the Registrar under the Act. We thought that was the meaning of "fully winding up," and that being so, we thought there was no power to go behind the dissolution except in the case which I suggested as a possible case—the case of absolute fraud—fraud which the company could be fixed with. If there were a case of that kind, then very likely the whole thing might be set aside; that is to say, it might, on proper proceedings being taken, be made clear that the whole winding-up was null and void, and then the company would be restored again to its position, subject to claims of creditors and contributories, or any other persons who might have rights to enforce or equities to be adjusted in relation to the company. But in the absence of any case of fraud of that kind it seems to me that the Court has no jurisdiction whatever.

It is said that there may be some hardship in refusing a winding-up order. I doubt whether there could be any hardship to the creditors, because at any moment the creditor who had a debt was never precluded during the existence of the company from presenting a petition for a compulsory winding-up on the ground of any debt due to him, or taking proceedings to obtain an injunction, as mentioned in one of the cases, to prevent the completion of the winding-up and dissolution of the company. More than that, if there had been any miscarriage on the part of the liquidator—if he had knowingly and wilfully left unpaid a debt of which he had notice, I am not prepared to say that the liquidator is not personally answerable to the creditor who has been unpaid, because the liquidator has violated a plain statutory duty to pay the debts *pari passu* out of the assets of the company as they came to his hands. The creditor might say, "You have assets, you ought to have paid me; you did not pay me, and I have my remedy against you for that." Certainly, if the liquidator were

guilty of anything like *mala fides* or dishonesty or fraud—I do not care which word you use—or if any persons were his accomplices in that *mala fides*, dishonesty, or fraud, he and they could, no doubt, be made liable to the person defrauded by their conduct.

I am, therefore, of opinion that the decision of the Master of the Rolls was quite correct, and that the appeal must be dismissed with costs.

BAGGALLAY, L.J.:—

Although I was not a member of the Court at the time when the case of the *Pinto Silver Mining Company* (1) was disposed of, I am of course bound by that decision; but I desire to express my entire concurrence in the principle enunciated by the several Judges in that case.

Also, while thinking that after the three months limited by the Act have expired the Court has no jurisdiction to order the winding-up, I agree in that which was said by Lord Justice *James*, to the effect that where some particular reason exists why that which has been done should be undone, as in a case, for instance, of fraud in connection with the proceedings, there should be some way of setting aside those proceedings. And I not only agree in the principles enunciated in the case of the *Pinto Silver Mining Company*, but also in the application of those principles to the facts of the case before the Court. I am really unable to distinguish the facts of this case from the facts in the case referred to.

BRAMWELL, L.J., concurred.

Solicitors: *Waltons, Bubb, & Walton; Phelps, Sidgwick, & Biddle.*

(1) 8 Ch. D. 273.

C. A.
1879
March 21.

KREHL *v.* BURRELL.

[1876 K. 30.]

Right of Way—Damages under Lord Cairns' Act (21 & 22 *Vict. c.* 27), *s.* 2—*Injunction.*

Post 793.
14 Ch D 549
15 Ch D 332

Where a Plaintiff has established his right to a perpetual injunction against the Defendant the Court has no power under *Lord Cairns' Act* to oblige him against his will to accept damages in lieu of the injunction.

The decision of *Jessel*, M.R., affirmed.

THIS was an appeal from a judgment of the Master of the Rolls (1).

The action was brought by the Plaintiff, as owner and occupier of a public-house in *Coleman Street*, in the City of *London*, known as the *Three Tuns*, with a restaurant and dining-rooms, to restrain the Defendant from erecting a building on the site of an adjoining court called *Windmill Court*, over which the Plaintiff and his predecessors in title claimed an uninterrupted right of way to and from the said house for forty years.

The Plaintiff gave notice to the Defendant of his rights when the Defendant first began to obstruct the right of way, and issued the writ in the present action before the Defendant's building was completed; but the Defendant nevertheless completed his building, which was a large and expensive structure, blocking up the access to the Plaintiff's house.

The trial came on in December, 1877, when the Master of the Rolls was of opinion that the Plaintiff had established his right, and gave a verdict for the Plaintiff accordingly; but before giving judgment directed the case to stand over to see what terms the Defendant would propose.

On the 28th of January, 1878, the case came on for judgment, when it appeared that the parties had not been able to come to any terms, and the Court therefore gave judgment for a perpetual mandatory injunction against the Defendant.

The Defendant appealed from this judgment. The appeal came on to be heard on the 6th of December, 1878, when the Court

(1) 7 Ch. D. 551.

held that if the Defendant wished to dispute the verdict he ought to have moved for a new trial within twenty-one days after the delivery of the verdict, and that as he had not done so the verdict was conclusive as to the fact that the Plaintiff was entitled to a right of way. The further hearing of the appeal was adjourned (1).

1879. March 21. The appeal now came on again on the question of the relief to which the Plaintiff was entitled.

Sir *J. Holker*, A.G., and *Chitty*, Q.C. (*Hemings* with them), for the Appellant:—

Lord Cairns' Act gives the Court discretion to award damages instead of granting an injunction. The present is a case for damages. The injury to the Plaintiff caused by loss of his right of way could be compensated by reasonable damages; whereas the obligation on the Defendant to pull down the expensive structure which has been erected would be very oppressive: *Curriers' Company* v. *Corbett* (2).

Davey, Q.C., and *Everitt*, for the Plaintiff, were not called on.

JAMES, L.J.:—

I am of opinion that there is no ground for this appeal. The question as to the right of way was decided at the trial in favour of the Plaintiff, and no appeal having been brought against the verdict of the Master of the Rolls within the proper time, it is binding upon this Court. The Plaintiff then being entitled to this right of way, the Defendant obstructed and continued to obstruct it, building on the piece of ground over which it existed. The Plaintiff brought his action complaining of the obstruction in due time, but the Defendant went on with the obstruction, relying upon the defence that the Plaintiff had no such right of way as he claimed. Having taken upon himself to do this he must take the consequences. The Plaintiff has established his right to have the obstruction removed, and the Defendant must remove it in such way as he can, either by making a way through his building or by removing the building. The Plaintiff has a plain legal

(1) 10 Ch. D. 420.

(2) 2 Dr. & Sm. 355; 4 D. J & S. 764.

C. A. 1879 KREHL v. BURRELL.

right, and is entitled to have the order of Court which the Master of the Rolls has made to enforce his right. It was not intended, and never could have been intended, by the Legislature, in giving a right to damages under *Lord Cairns' Act*, to compel a man who is wronged to sell his property to the person who has wronged him. No such right as is claimed by the Appellant can exist in this country unless specially given by Act of Parliament. If it were otherwise, the consequence would be that a person would have a right to do a wrong to his neighbour at a price to be fixed by the Court. The case of *Durell* v. *Pritchard* (1) and similar cases do not, in my judgment, apply to this case, where the Defendant proceeded to do the wrong after action brought.

BAGGALLAY, L.J.:—

I am of the same opinion. I will only add that I adopt the view expressed by the Master of the Rolls as to the way in which the Court ought to exercise the discretion which it has of awarding damages under *Lord Cairns' Act*.

BRAMWELL, L.J., concurred.

Solicitors: *C. M. Roche; E. Burrell.*

C. A. 1879 *March* 27.

Ex parte BROWN. *In re* YATES.

Court of Bankruptcy—Jurisdiction—Distinction between Transactions void as against Bankrupt himself and Transactions not void as against him but void as against his Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.

Where a trustee in bankruptcy claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals. But where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt (where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy), the Court of Bankruptcy ought to decide the matter itself.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

(1) Law Rep. 1 Ch. 244.

C. A.
1879
Ex parte BROWN.
In re YATES.

The order appealed from was made on the application of the trustee in the bankruptcy of *George Yates*, and it directed that a mortgage executed by him on the 20th of July, 1874, should be delivered up to be cancelled. The ground of the decision was that the deed was a contrivance to defeat the creditors of the bankrupt, and also that it was a conveyance of substantially the whole of his available assets to secure a pre-existing debt. The mortgagees appealed.

Horton Smith, Q.C., and *A. Young*, for the Appellants:—

The Court of Bankruptcy ought not to exercise jurisdiction, the Appellants being mere strangers to the bankruptcy. The matter ought to be left to be dealt with by the ordinary tribunals: *Morley* v. *White* (1); *Ex parte Lyons* (2); *In re Motion* (3).

[JAMES, L.J.:—This point is really not arguable. Questions of fraudulent preference and acts of bankruptcy are the very things which were intended to be dealt with by the Court of Bankruptcy. Where the trustee takes only that which the bankrupt himself would have taken the matter should be left to the ordinary tribunals. But where, by the operation of the bankrupt law, the trustee claims by a higher and better title than the bankrupt, the matter is one which was intended to be dealt with by the Court of Bankruptcy.]

At any rate, the Registrar came to a wrong conclusion upon the facts.

E. C. Willis, for the trustee, was not heard.

THE COURT (*James*, *Baggallay*, and *Bramwell*, L.JJ.) held that the Registrar had come to a right conclusion, and dismissed the appeal.

JAMES, L.J.:—

It may be as well to repeat that when a deed is impugned on the ground that it is void by the operation of the bankrupt law,

(1) Law Rep. 8 Ch. 214. (2) Law Rep. 7 Ch. 494.
(3) Law Rep. 9 Ch. 192.

C. A. 1879 *Ex parte* BROWN. *In re* YATES.

not on a ground which would have been available to the bankrupt himself, the case is pre-eminently one which the Court of Bankruptcy ought to decide itself, and not to leave to the ordinary tribunals.

Solicitor for Appellants: *H. D. Ilderton.*
Solicitor for Trustee: *H. Montagu.*

C. A. 1878 *Dec.* 13, 17. 1879 *Jan.* 11.

WATSON *v.* RODWELL.

[1876 W. 103.]

Solicitor and Client—Bill of Costs—Settled Account—Taxation after Payment—Special Circumstances—Undue Influence—Unnecessary Business—Solicitors Act (6 *&* 7 *Vict. c.* 73), *s.* 41—*Practice—Evidence.*

An account which had been settled between a client, who was an old lady, and her solicitor, including arranged bills of costs, was ordered to be opened and the bills of costs taxed, after the lapse of nearly two years, without actual proof of error or overcharge, on the ground that the client had acted under undue influence and without sufficient information, and that much of the business charged for was unnecessary and improper.

The judgment of *Malins*, V.C., affirmed.

All documents intended to be used in evidence in an action ought to be formally put in at the trial and marked by the Registrar.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

The action was brought by Mrs. *Watson*, a widow, aged seventy-seven, against her solicitor, seeking to open a settled account, dated the 22nd of May, 1874, and to tax bills of costs which had been paid more than twelve months before the institution of the suit.

William Watson, the Plaintiff's husband, by his will, dated in 1861, appointed the Plaintiff and *J. Wilson* his executors, and gave his property, which consisted only of leaseholds and shares in the *London Joint Stock Bank*, to the Plaintiff for her life, and after her death he charged his real and personal estate with payment of an annuity of £500 to Mrs. *Woodman*, the Plaintiff's sister, and after her death upon trust for sale, and to divide the

(1) 7 Ch. D. 625.

produce between Mrs. *Woodman's* children living at her death; and he gave and bequeathed all his personal estate to the Plaintiff absolutely.

William Watson died in 1872, and an administration suit of *Watson* v. *Wilson* was instituted by the Plaintiff on the 7th of June, 1872, for the purpose of deciding certain questions of construction arising on the will, Messrs. *Kimber & Ellis* being the solicitors.

On the 29th of November, 1872, a suit of *Woodman* v. *Watson* was instituted by *Walter Woodman*, one of Mrs. *Woodman's* children, for administration of the same estate. In this suit Mr. *Rodwell* acted as solicitor for the Plaintiff. It appeared from the evidence that Mr. *Rodwell* agreed with *W. Woodman* that he should only pay costs out of pocket.

The Plaintiff in *Watson* v. *Wilson* obtained a decree for administration in that suit; but no decree was made in *Woodman* v. *Watson*.

Negotiations for a compromise between the Plaintiff and the *Woodman* family were set on foot, in which Mr. *Rodwell* acted for the *Woodmans;* but in the month of July, 1873, the Plaintiff went to Mr. *Rodwell's* office, apparently at the suggestion of Mr. *Rodwell*, and became his client. The negotiations proceeded, and resulted in the arranging of a compromise between the Plaintiff, her sister, and her sister's children, by which the Plaintiff was to forgive the latter certain debts, to allow her sister a certain annuity, and to take the residue for herself. All the parties were *sui juris*, except that two of Mrs. *Woodman's* sons were bankrupt, and a deed of arrangement was prepared embodying the following terms:—1. The Plaintiff released her nephews, Mrs. *Woodman's* sons, from certain debts; 2. Mrs. *Woodman* and her sons assigned to the Plaintiff their contingent interests in the leaseholds; 3. *J. Wilson* (the executor) was indemnified from all liability under the will; 4. The Plaintiff allowed Mrs. *Woodman* a present annuity of £100 in place of the deferred annuity of £500; 5. The Plaintiff undertook to pay all costs of *Watson* v. *Wilson*, and *Woodman* v. *Watson*, and of the compromise. Two of the sons of Mrs. *Woodman* being bankrupt, the deed was expressed to be provisional only as regarded them.

C. A. 1878 WATSON v. RODWELL.

A petition was prepared by the Defendant Mr. *Rodwell*, acting as solicitor for all parties (to which, however, the assignees of the bankrupts' estates were not made parties), to obtain the consent of the Court to this compromise and to wind up the administration suits. An order was made in accordance with the prayer of the petition, and the deed of compromise was executed together with other deeds, including a deed of indemnity to Mr. *Wilson*, the Plaintiff's co-executor.

It was proved to the satisfaction of the Vice-Chancellor that the costs of the deeds of compromise and the petition, which in his opinion was unnecessary, amounted to nearly £1000.

The Defendant produced evidence that the deed and the petition were explained to the Plaintiff, and that at the hearing of the petition the Vice-Chancellor asked the Plaintiff if she understood that she was to pay the costs of the suits, and that she said she did.

At the hearing of the petition it was ordered that £1000 should be deposited to answer the costs of Messrs. *Kimber & Ellis*, and certain of the bank shares were converted for this purpose.

On the 25th of March, 1874, the Defendant delivered to the Plaintiff his bill of costs and cash account, which, after providing for his own and Messrs. *Kimber & Ellis*' bill of costs, shewed a balance due to the Defendant of nearly £350.

On the 22nd of May, 1874, the balance due to the Defendant was agreed at £230, and a memorandum to that effect was placed at the foot of the cash account, and signed by the Plaintiff and the Defendant. The Defendant relied on this as a settled account, and declined to reopen it, or to have any bills prior to that date taxed.

The Defendant was in the habit of making advances to the Plaintiff, who was now in great poverty, and held securities upon her interest in the leasehold houses to secure the amount owing from her to him, which included further costs.

The facts and correspondence which were considered material by the Court of Appeal are specially referred to in the judgment.

The present action was brought on the 21st of March, 1876, and came on for hearing before Vice-Chancellor *Malins* on the 13th of December, 1876.

The Vice-Chancellor gave judgment for a general account of all dealings between the Plaintiff and Defendant, and the usual accounts of what was due on the securities, and ordered that the Defendant should pay the costs of the action.

From this judgment the Defendant appealed. The appeal came on for hearing on the 13th of December, 1878.

Glasse, Q.C., and *Renshaw*, for the Appellant:—

The judgment of the Vice-Chancellor is against the weight of evidence, and is wrong in point of law. There is no evidence of pressure, nor are there any special circumstances to justify the Court in opening the settled account of May, 1874, or taxing the bills before that date: *Blagrave* v. *Routh* (1).

In the course of the argument certain letters were tendered in evidence which were not marked by the Registrar, or specially noticed in the judgment of the Vice-Chancellor as it was drawn up. The judgment, which was in the form usually adopted in the Chancery Division, ran thus: "This action coming on for trial on, &c., and upon reading the statement of claim, &c., two notices to admit certain documents as evidence, dated respectively, &c., and the admissions thereof in writing signed by the solicitor for the Plaintiff, and the usual documents therein referred to respectively; two notices to admit certain documents as evidence dated respectively, &c., and the admissions thereof respectively, signed by the solicitor for the Defendant, and the usual documents therein referred to, &c."

JAMES, L.J., said that no documents were evidence unless they were put in at the trial. The mere fact that they were admitted in the admissions did not make them evidence. Every document which it was intended to use in evidence ought to be formally put in, and marked by the Registrar.

Fooks, Q.C., and *W. Fooks*, for the Plaintiff, supported the judgment of the Vice-Chancellor. They cited *Nokes* v. *Warton* (2).

Glasse, in reply.

(1) 8 D. M. & G. 620. (2) 5 Beav. 448.

C. A. 1879 WATSON v. RODWELL.

1879. Jan. 11. JAMES, L.J., now delivered the judgment of the Court (*James, Baggallay,* and *Thesiger,* L.JJ.) as follows:—

The Plaintiff in this action seeks an account of the moneys received on her account by the Defendant, who was her solicitor. The Defendant admits that she was entitled to such account, but insists that it should be taken with directions that an account alleged to have been settled between them in May, 1874, should not be disturbed, and that the bills of costs paid in and by such settlement should not be taxed or opened. The account is produced, signed by the Plaintiff and the Defendant, and is attested by the Defendant's clerk. The account, when produced, shews that the Defendant takes credit for, among other sums, the following amounts:—Costs of the Plaintiff herself, £513 1*s.* 1*d.*, and the costs of several other persons, clients of the Defendant, making a total of £345 2*s.* 6*d.* These costs are alleged to have been incurred, and the right to charge them against the Plaintiff to have arisen in the following circumstances:—The Plaintiff's late husband, who was possessed of an estate of moderate amount, sworn under £10,000, made his will in March, 1861, by which he gave his property to the Plaintiff for her life, and after her death charged his real and personal estate with payment to Mrs. *Woodman* (the Plaintiff's) sister of an annuity of £500, and after her death upon trust for sale, and to divide the produce between her children living at her death, and he gave and bequeathed all his personal estate to the Plaintiff absolutely. There arose a doubt as to the true construction of the will with respect to the respective interests of the Plaintiff and the *Woodman* family, and it was thought necessary, and it probably was necessary, that a suit should be instituted, a common administration suit, for the purpose of taking the ordinary accounts and settling the construction of the will. This legal controversy did not disturb the amicable feelings which existed between the Plaintiff and her relatives, the *Woodmans,* and there was no reason why the suit should not have been as friendly, as short, and as inexpensive as any administration suit ever instituted in the Court of Chancery. A bill was filed by Messrs. *Kimber & Ellis,* as solicitors of the Plaintiff, against her co-executor, Mr. *Wilson,* and Mrs. *Woodman,* the annuitant, who appeared respectively by solicitors

other than the Defendant *Rodwell*. But the Defendant *Rodwell* was consulted by some members of the *Woodman* family as to their interests under the will and as to a compromise of their claims. The first appears to have been *James Woodman*, and after many attendances, letters, conferences, &c., extending from the 18th of July to the 26th of August, the Defendants ascertained that *James Woodman* was a bankrupt, and had, therefore absolutely no interest under the will and no right whatever to interfere. The Defendant *Rodwell* continued, however, to act as if his client *James Woodman* had an interest, making costs for himself and, of course, making costs against the Plaintiff, whose solicitors had to receive and answer letters and other communications. But on the 26th of September, this entry appears in the bill of costs:—"Attending you, long conference with you as to filing a bill against your uncle's estate, when I advised that you not being *sui juris* were not in a position to do so, and you were to call here with your brother *Walter*." On the same day the Defendant *Rodwell* wrote to *Walter Woodman* as follows:—

"Dear Sir,—*Re Watson*—Adverting to the instruction given to me by you to-day to file a bill for the administration of the late Mr. *Watson's* estate, I beg to say that I will only hold you responsible for costs out of pocket, but if I obtain my costs out of the estate I shall make no charge against you whatever in the intended suit."

After a long series of conferences, letters, &c., it was at last determined to file the bill in *Woodman* v. *Watson*, and it was filed on the 28th of November, 1872. This was a common administration suit, with the addition of a prayer for a receiver and an injunction. But there were no sufficient grounds for such a prayer, and the Defendant *Rodwell* was so advised and so advised his client. There was one object, and one object only, in adding such prayer, viz., to make it appear that the suit was not merely a suit for the same objects as the existing suit of *Watson* v. *Wilson*. That suit was ready to be heard as a short cause, and in the ordinary course it would have been so heard and a decree made, under which decree all the *Woodmans* interested would have had

C. A. 1879 WATSON v. RODWELL.

a right to appear in Chambers and have had every opportunity to protect their own interests. But Mr. *Rodwell* was of opinion, or represented it as his opinion, that if such decree were made the chance of obtaining the terms of compromise insisted on by his clients, the *Woodmans*, would be gone. On the 2nd of December, he is found attending counsel to confer as to the course to be pursued to prevent a decree being made in the suit of *Watson* v. *Wilson*, and on the same day we find the following entry in his bill of costs:—"Attending at your request and conferring and advising on matters generally, and particularly pointing out that if a decree was made in the suit of *Watson* v. *Wilson*, all chances of compromise of this suit would probably fall through, when you informed me that your mother's solicitor had countermanded his consent to the cause of *Watson* v. *Wilson* being heard as a short cause." And the Defendant *Rodwell*, by various steps and means, succeeded in preventing its being heard until the 15th of February, when it was heard and the usual decree made. The Defendant *Rodwell* again interfered to endeavour to prevent the decree being drawn up, but in vain. It is impossible to conceive anything more reprehensible than this conduct on the part of the Defendant. It was the plain interest of his clients, the *Woodmans*, as of all other persons interested in the estate, to have such a decree made as soon as possible, and as cheaply as possible, and to have the usual accounts taken without delay. It might have served, and probably did serve, by the fear and annoyance occasioned by the new suit, to coerce Mrs. *Watson* into a concession of his client's terms of compromise, and of course it served to enable him to heap up the enormous bill of costs which we have before us in *Woodman* v. *Watson*, and which he looked to have paid out of the estate to which he had (except as to costs out of pocket) bound himself to his client exclusively to look. After the decree was made in *Watson* v. *Wilson*, the Defendant *Rodwell* took the usual step of appearing for the parties interested under the will, and the unusual step of including among them two persons, one of whom was a bankrupt and the other had filed a liquidation petition, which, while it, of course, had deprived them of all interest, opened fresh fields from which Mr. *Rodwell* could gather

in a fresh harvest of costs. On the very day the bill in *Woodman* v. *Watson* was filed, *Rodwell* wrote to *Walter Woodman* a letter in which occurs the following passage :—

"It would seem that Mrs. *Watson* has turned Mr. *Ellis* up. If that be so, can she not be induced to come here and instruct me to prepare a deed of arrangement—that would be one way of curtailing expenses? In the course of to-morrow you will doubtless see which way the cat jumps, and be able to furnish me with information as to Mrs. *Watson's* line of policy."

In the month of December, 1872, *Rodwell* became the solicitor for Mrs. *Woodman* in the suit of *Watson* v. *Wilson*, so that he had every means of protecting the interest of the *Woodman* family if they required protection. Notwithstanding this, *Rodwell* proceeded in the most energetic way to carry on the unnecessary suit of *Woodman* v. *Watson*, and in like manner to oppose the usual decree being made in *Watson* v. *Wilson*. After many months' accumulation of costs in both suits, *Rodwell*, in July, 1873, became the actual solicitor of Mrs. *Watson* herself. On the 10th day of July, 1873 (I read from the Defendant's answer), a meeting took place between Mrs. *Watson* and all the members of the *Woodman* family, when it was arranged that Mrs. *Woodman* should release her annuity, and that Mrs. *Watson* should allow her to have a house and furniture for her life and pay her an annuity of £100 a year, and this agreement was reduced into writing. Nothing was said about the costs of any parties, but the Defendant says, and apparently with accuracy, that it was understood that the costs of all parties were to be paid, the *Woodmans* having always insisted on that term during the negotiation. To carry out this compromise, very voluminous and very expensive deeds and a petition to the Court were the machinery resorted to. A more unnecessary or futile proceeding was probably never taken than this petition. The parties, except the bankrupts, were fully competent to make any arrangement they thought fit without the consent of the Court, and the Court, of course, had no power to bind the estate of the bankrupts, who were not represented. It had one effect, however—it appeared to give, and was, no doubt, understood by Mrs. *Watson* as giving, the personal sanction of the Vice-Chancellor to the com-

C. A. 1879

WATSON v. RODWELL

promise as a proper one; and it appears that the Vice-Chancellor, who had seen something of the old lady in Chambers, and saw her in Court on the hearing of the petition, did take the trouble of calling her to him and ascertaining whether she understood and approved what was proposed to be done. The petition contains the following statement of the arrangement as to costs. "Your Petitioner also undertakes to pay all the costs of and incidental to the two suits of *Watson* v. *Wilson* and *Woodman* v. *Watson*, and of this compromise thereof." And it contains the following statement: "The draft of a deed of compromise and arrangement or settlement embodying all the terms aforesaid has been prepared and approved of by all parties," and it craves leave to refer to such draft as part of the petition.

The covenant as to costs contained in the draft is as follows:— [His Lordship then read the terms of the covenant as to costs contained in the draft deed of compromise by which the Plaintiff covenanted with the several parties to pay all their costs relating to the testator's estate.] This is a very different covenant indeed from the arrangement which the Court was told was embodied in it. In terms and in legal effect it was a covenant by Mrs. *Watson* with the several covenantees to pay their costs; but in intention and practical effect it was an obligation by Mrs. *Watson* to discharge all Mr. *Rodwell's* bills of costs against all the parties in respect of anything that he had ever done, said, or written to or for every one of the parties in any way in respect of the testator's estate. He being her solicitor, and she having no other advice or assistance, takes from her an obligation to pay all these costs without any information as to the amount, or probable amount, or as to how they had been incurred. He did claim under it to retain hundreds of pounds of her money. It might just as well have been so many thousands. He might have had a dozen interviews where he had one, he might have written a dozen letters where he wrote one, and multiplied indefinitely cases, opinions, conferences, and consultations. It is out of the question that a solicitor can be allowed to avail himself against an unprotected client, a lady of advanced years, of a demand so founded. The settled account is based upon this deed, and it is obvious that a settlement so based cannot stand.

A good deal of argument was addressed to the Court below and in this Court as to the opportunity the Plaintiff had of taxing the bills, and on the point that there was no sufficient allegation or proof of error in the settled account, or of overcharge in the costs, as to entitle her to have the account opened or the bills taxed. This case, however, does not depend on opening settled accounts for error alleged and proved, or on the taxation of bills after payment. It is not necessary, therefore, to go into what took place between Mrs. *Watson* and the solicitor into whose hands she gave the bills for taxation, or as to the money which Mr. *Rodwell* lent her to meet the requisition of such solicitor, nor as to the correspondence and communications which passed between Mr. *Rodwell*, Mrs. *Watson*, and the *Woodmans* prior to the alleged settlement of the account; for no settlement, no payment, no taxation even, is or would have been of any avail between a solicitor who had got his client bound by such an obligation and that client, unless and until she had the fullest information and independent legal advice as to that obligation, and as to all the circumstances under which he had continued to multiply and accumulate costs against her. The Vice-Chancellor was of opinion that the mere aspect of the bills was sufficient to justify opening the whole matter, and if it were necessary we should say that we are not prepared to dissent from him. The amount of costs, the booty which was carried off from this small estate without the slightest benefit to any human being, except the professional men, shocks one's conscience and induces one to say *Res ipsa loquitur*. The Vice-Chancellor's decree directing the accounts to be taken, in effect setting aside the settlement and the payment of costs made in and by such settlement, must stand. The Vice-Chancellor goes on to declare that the Defendant is not entitled to any costs of the petition. We entirely agree that it was not only unnecessary and fruitless, but it was from the first futile. But more than that, it was in our opinion presented entirely in the interest of the Defendant himself in order to get the apparent sanction of the Judge to his getting paid out of the estate costs which it was quite certain he would never get from his several clients, or in any other way. The Vice-Chancellor has also disallowed him his costs in the suit of *Woodman* v. *Watson*. This also is right in

C. A. 1879 WATSON v. RODWELL.

principle, although unnecessary in point of form; for as between the Plaintiff and the Defendant, the latter has no legal or equitable demand in respect of the costs of any other persons. His right, whatever it may be, is against such other persons as his clients, and they may have such remedy over against her as they may be entitled to under her covenants. That is the legal effect and result of the covenant as framed by him, and he must abide by it. The appeal must be dismissed with costs.

Solicitors: *J. Mote; Stevens & Co.*

C. A. 1879 Feb. 28.

In re STANHOPE SILKSTONE COLLIERIES COMPANY.

Winding-up—Secured Creditor—Garnishee Order Nisi—Bankruptcy Act, 1869, *s.* 12—*Judicature Act*, 1875, *s.* 10.

11 Ch D 946
14 Ch D 44
5 C P D 338
17 Ch D 164

A judgment creditor who has obtained a garnishee order *nisi* to attach debts due to his debtor does not obtain any charge on the debts until service of the order *nisi* on the garnishees. Therefore, where a judgment creditor of a company obtained a garnishee order against a debtor of the company and before the order *nisi* was served, a petition was presented to wind up the company on which an order was afterwards made, it was *held* (reversing the decision of *Fry*, J.), that the creditor was not a secured creditor at the time of the commencement of the winding-up.

THIS was an appeal from an order made by Mr. Justice *Fry*, sitting for Vice-Chancellor *Malins*.

On the 16th of October, 1878, the *Sheffield Waggon Company* recovered judgment against the *Stanhope Silkstone Company* for £1684. On the 22nd of January, 1879, the judgment being still unsatisfied, they obtained a garnishee order *nisi* against the *Newmarket Gas Company* to attach all debts due from that company to the *Stanhope Silkstone Company*.

This order *nisi* was not served on the *Newmarket Gas Company* till the 25th of January. In the meantime, on the 24th of January, a petition was presented for the winding-up of the *Stanhope Silkstone Company*, upon which an order for winding up was afterwards made. The garnishee order was made absolute on the 30th of January.

C. A. 1879

In re STANHOPE SILKSTONE COLLIERIES COMPANY.

On the 27th of February the provisional liquidator of the *Stanhope Silkstone Company* applied to Mr. Justice *Fry* for an order restraining the *Sheffield Waggon Company* from taking any further proceedings against the *Newmarket Gas Company* under the garnishee order, but his Lordship refused the application with costs.

The provisional liquidator now renewed the application before the Court of Appeal.

Glasse, Q.C., and *Everitt*, for the Appellant:—

The garnishee order *nisi* was not served on the garnishees when the petition for winding up was presented, which is the date of the commencement of the winding-up: therefore the *Sheffield Waggon Company* were not secured creditors within the meaning of the *Bankruptcy Act*, 1869, s. 12, which, by virtue of the *Judicature Act*, 1875, s. 10, now applies to the winding-up of a company. The decision in *Ex parte Joselyne* (1) does not apply, because there the order *nisi* had been served before the commencement of the bankruptcy.

Millar, for the *Sheffield Waggon Company*:—

The fact that the garnishee order *nisi* was not served makes no difference. The granting of the order *nisi* is sufficient to attach the debt in the hands of the garnishees. This appears to be the basis of the reasoning of Lords Justices *Cotton* and *Thesiger* in *Ex parte Joselyne*.

JESSEL, M.R.:—

The attachment or garnishee order is a mode of enforcing by execution the payment of the debt in the original action; and the order that the debt be attached and that the garnishee, that is, the debtor of the original judgment debtor, shall appear to shew cause why he should not pay the debt, does not operate to give the Plaintiff in the original action any security until it is served. It is quite plain that the garnishee before service may pay his own creditor, that is, the original judgment debtor, and then the judgment creditor would have no remedy under the order, but would

(1) 8 Ch. D. 327.

C. A. 1879 *In re* STANHOPE SILKSTONE COLLIERIES COMPANY.

have to issue execution against the judgment debtor upon the original unsatisfied judgment. It is, in fact, an imperfect execution, and would therefore not be saved by the *Bankruptcy Act* as being a security in the hands of the secured creditor. Under the 10th section of the *Judicature Act*, 1875, the rules in bankruptcy apply where the company is insolvent, as I understand this company is. But, independently of that, we must recollect that every attachment not put in force before the commencement of the winding-up is made void under the 163rd section of the *Companies Act*, 1862. Now this is an attachment against the estate and effects of a company. The debt due to the company is certainly a part of the estate and effects of the *Stanhope Silkstone Company*. No one can say that the attachment has been put in force, for nothing whatever has been done under it, and therefore if it were not saved by the 10th section of the *Judicature Act*, 1875, it would be avoided by the 163rd section of the *Companies Act*, 1862. It is plain, therefore, that this creditor has no security, and no right to the debt as against the liquidator in the winding-up.

JAMES, L.J.:—

I am entirely of the same opinion. It is impossible, as it seems to me, on any principle to distinguish this case of an execution against debts from an execution against goods and chattels. In this particular case the creditor is made his own sheriff, and he is allowed to make his own execution just as a landlord puts in a distress himself for rent. There is no distinction in principle between them. The writ of execution against goods does not prevail unless it has been actually executed. So the order of attachment, or the writ of attachment—they are the same thing in my opinion—does not prevail until it has been executed by being served upon the debtor. That being so, it appears to me it is an imperfect execution, which is defeated by the fact of the intervening bankruptcy, or what is in this case equivalent to bankruptcy, namely, the winding-up.

BRAMWELL, L.J.:—

I am of the same opinion for the same reasons. The only

remark I shall make is this, that the order absolute does not purport to attach the debts, but orders "that they be attached," that is, upon something further being done. It is like the order for the attachment of a person for contempt. He is not attached upon the writ issuing, but he is attached under it.

Solicitors: *Layton & Jaques; Bell, Brodrick, & Gray.*

In re PRICE, Deceased. PRICE *v.* PRICE.

[1876 P. 214.]

Husband and Wife—Wife of Debtor, Executrix and Residuary Legatee of Creditor—Extinguishment of Debt.

Mrs. *W.* made her daughter, Mrs. *P.*, her sole executrix and universal legatee. At the death of Mrs. *W.* her son-in-law, *P.*, was indebted to her on a bond conditioned for payment of a sum of money by yearly instalments, some of which did not become due till after her death; but others which became due before her death remained unpaid. Mrs. *P.* proved the will, and about twelve months after her mother's death passed the residuary account, shewing that the debts were all paid. *P.* took the bond into his possession and kept it till his death, which took place more than six months after passing the account, and applied to his own use all the other personal estate of Mrs. *W.* After the death of *P.*, a decree having been made for administration of his estate, Mrs. *P.*, as executrix of her mother, sought to prove as a creditor on the bond:—

Held (reversing the decision of *Hall*, V.C.), that, as the debts of Mrs. *W.* had been paid, and the residue had become a clear fund in the lifetime of *P.*, the liability of *P.* on the bond was extinguished, and the proof could not be allowed.

THIS was an appeal by the Plaintiffs from an order of Vice-Chancellor *Hall* made in Chambers.

On the 1st of April, 1865, *John Price* gave to his mother-in-law, *Jane Williams*, widow, a bond in the penal sum of £4826 14*s.*, conditioned for payment of £2413 7*s.* with interest, the principal to be repaid by eleven yearly instalments of £200 each, on each 1st of April down to the 1st of April, 1876, and a final instalment of £213 7*s.* on the 1st of April, 1877.

Jane Williams died on the 16th of September, 1869, and at her

C. A. 1879 — *In re* PRICE, DECEASED. PRICE v. PRICE.

death there was due on the bond £1863 7*s.* for principal, *Price* not having paid the instalments regularly, but having paid various sums on account, not amounting to so much as £200 a year.

Mrs. *Williams* by her will appointed her daughter *Margaret Price*, wife of the above *John Price*, her sole executrix, and bequeathed all her personal estate to her, not limiting it to her separate use.

Mrs. *Price* proved the will, and on the 13th of September, 1870, passed the residuary account, in which she stated the value of the personal estate at £915, no mention being made of the bond, and duty was paid on the residue. *Price* some time after Mrs. *Williams*' death took possession of the bond, and he converted to his own use all the residue of Mrs. *Williams*' personal estate.

Price died intestate on the 8th of April, 1871, and *Margaret Price* took out letters of administration to his estate. The bond was in his possession at his death uncancelled. The present action was by two of his next of kin for administration of his estate. Mrs. *Price* claimed as legal personal representative of her mother to be a creditor on the bond against his estate for the £1863 7*s.*, with an arrear of interest. The Chief Clerk, by his certificate, allowed her as a creditor for that amount. The Plaintiffs applied by summons to vary the certificate in this respect, and the application was refused by Vice-Chancellor *Hall*.

W. Pearson, Q.C., and *Dryden*, for the Appellants:—

Mrs. *Price* fully administered the estate of her mother in her husband's lifetime, and the debt due from him was treated as extinguished. If she had not been absolutely entitled we could not contend that the debt was gone; nor do we say that it could be treated as extinguished while there were any debts of Mrs. *Williams*' unpaid; but when once the estate was clear the husband's liability ceased. A bond between husband and wife before marriage is extinguished by the marriage unless it be in anticipation of the marriage, or is held in *autre droit*. *Wankford* v. *Wankford* (1) states the law very clearly. There was a reduction into possession: *Aitchison* v. *Dixon* (2); *Nicholson* v. *Drury Buildings Estate Company* (3).

(1) 1 Salk. 299, 306. (2) Law Rep. 10 Eq. 589.
(3) 7 Ch. D. 48, 55.

Mulligan, for next of kin having liberty to attend.

Dickinson, Q.C., and *Langworthy*, in support of the decision of the Vice-Chancellor :—

The bond must continue in force until a state of circumstances has arisen such that it must be taken that the fund is not required for the purposes of administration of Mrs. *Williams*' estate.

[JESSEL, M.R., referred to *Locke* v. *Crosse* (1).

BRAMWELL, L.J.:—Suppose another person had been executor, and had assented to the bequest, the debts having been paid, would not the debt have been extinguished ?]

We submit that a married woman could not assent to the bequest so as to give a right to her husband. The right of action was suspended during the coverture, but on the death of the husband it revived: *Richards* v. *Richards* (2). The instalments which accrued after the death of the husband are, at all events, recoverable: *Fitzgerald* v. *Fitzgerald* (3). Some act of reduction into possession is necessary, and instalments which did not become due till after the determination of the coverture were not capable of being reduced into possession: *Preston* v. *Dania* (4).

[JESSEL, M.R. :—Your argument must go this length, that if the husband had destroyed the bond the debt would not have been released.]

Cage v. *Acton* (5) and *Milbourne* v. *Ewart* (6) shew that even at law a sum which cannot be recovered during the coverture is not released by the marriage.

[BRAMWELL, L.J. :—If this bond had belonged to the married woman in her own right, the debt would have been extinguished, although by statute the penalty in a bond is only a security for payment of the instalments. The exception in *Fitzgerald* v. *Fitzgerald* does not apply where the penalty has been forfeited.]

The appointment of a debtor to be executor does not in equity destroy the debt, it only destroys the right of action at law:

(1) 1 Salk. 305; 2 Lev. 72; 3 Keb. 116.
(2) 2 B. & Ad. 447.
(3) Law Rep. 2 P. C. 83.
(4) Ibid. 8 Ex. 19.
(5) 1 Ld. Raym. 515.
(6) 5 T. R. 381.

C. A. 1879 *In re* PRICE, DECEASED. PRICE *v.* PRICE.

Carey v. *Goodinge* (1). Here the husband could only take the bond as part of the residue, and, to become entitled to it, he must get rid of the creditors of the mother-in-law and the rights of the wife. The Court cannot treat him as having possessed himself of the reversionary instalments. The possession by a husband as executor and trustee is not a reduction into possession: *Baker* v. *Hall* (2).

JESSEL, M.R.:—

The facts of the case may be very shortly stated. The husband was indebted to his wife's mother on bond. The bond was a money bond to secure the payment of a sum by yearly instalments. Default was made in the mother-in-law's lifetime. She made a will appointing her daughter sole executrix and residuary legatee, and died in September, 1869. The daughter proved the will, and the husband survived the mother-in-law nearly nineteen months. The husband and wife in September, 1870, passed the residuary account, from which it appeared that the estate was clear, that the debts had been paid, and that the residue belonged to the wife, and duty was paid on that footing. Some time after the death of the mother, probably immediately after it, the husband obtained possession of the bond, and kept it till his death, and he converted to his own use all the rest of his mother-in-law's property. The residuary account makes no mention of this bond. The husband died in April, 1871; his wife took out letters of administration, and now claims in the capacity of legal personal representative of her mother to prove against his estate on the bond. The question is whether the debt had not been extinguished, and I am of opinion that it had.

An obligation in which the husband is obligor and the wife obligee, is destroyed by the marriage. That is the general rule of law. But exceptions have been introduced on the ground that this must not affect the rights of third parties. Where the wife is entitled to the bond as legal personal representative, and the extinguishment of the obligation would prejudice creditors or legatees, it will not take place. But where the wife, besides being personal representative, is residuary legatee, and it is shewn that the debts and legacies have been paid, there the reason for the

(1) 3 Bro. C. C. 110. (2) 12 Ves. 497.

exception ceasing, the exception ceases. That was the view of Lord *Holt*. It is said that there is not here sufficient evidence that the debts had been paid and the estate cleared. I think there is most cogent evidence that such was the case. The husband and wife passed a residuary account which shewed that the debts had been paid, and the husband applied the residue to his own purposes, treating it as a clear fund. There is no circumstance in favour of the wife except that the husband did not destroy the bond, which I do not think material.

BAGGALLAY, L.J.:—

I am of the same opinion, and have nothing to add.

BRAMWELL, L.J.:—

I am of the same opinion.

Solicitors: *Le Riche & Son; J. Whitehouse.*

L. J. J. for V.-C. M.

1879

March 5, 6.

In re HOLT (AN INFANT).

Practice—Contempt—Attachment—Ineffectual Service of Order—Delivery of untrue Copy—Infants' Custody Act, 1873 (36 & 37 *Vict. c.* 12).

An order that a father named *Holt* should deliver over his infant daughter to her mother was intituled in the matter of the infant (naming her) and in the matter of the Act 36 & 37 Vict. c. 12. The copy delivered to the father on serving him with the order was intituled only in the matter of the Act, and not in the matter of the infant, but it was indorsed on the outside "*Re Holt.*" The order was not obeyed, and an order was then made to attach the father, and he was arrested and lodged in prison:—

Held, that the service of the first order was ineffectual, and that the order to attach must be discharged as irregular.

THIS was a motion to discharge for irregularity an order of attachment made by Vice-Chancellor *Malins*. The motion was, in consequence of the illness of the Vice-Chancellor, heard by Lord Justice *James*, upon the request of the Lord Chancellor, under the provisions of sect. 51 of the *Judicature Act*, 1873.

On the 28th of June, 1878, upon the petition of *Hannah Holt*, the mother of *Florence Elizabeth Holt*, an infant, an order was made that *C. H. Holt*, the father of the infant, should, within four days after service of the order upon him, deliver her into the hands of the Petitioner. The petition was intituled "In the matter of *Florence Elizabeth Holt*, an infant, and In the matter of the Act 36 & 37 Vict. c. 12," and the order as drawn up was intituled in the same way. On the 23rd of November, 1878, the order was served on the father by shewing him the original, and delivering to him a document which purported to be a copy of it. The copy was, however, intituled only in the matter of the Act, not in the matter of the infant, but it was indorsed on the outside "*Re Holt.*" The order was not obeyed, and on the 12th of December, 1878, on the application of the mother, the Vice-Chancellor made an order giving her leave to issue a writ of attachment against the father. The father did not appear upon the hearing of this application, but there was an affidavit of service of notice of the motion upon him, and also an affidavit which stated that a true copy of the order of the 28th of June had been delivered to him. In pur-

suance of the order of the 12th of December a writ of attachment was issued, and the father was arrested and lodged in *Lancaster* gaol on the 22nd of January, 1879.

W. Renshaw, for the father, moved to discharge, as irregular, the order of the 12th of December, and to set aside the writ of attachment.

A true copy of the order of the 28th of June not having been delivered to the father, no effectual service of the order has been effected upon him, and all the subsequent proceedings are invalid: *Hinde* v. *Blake* (1); *Mackenzie* v. *Mackenzie* (2); *Rex* v. *Calvert* (3); *In re Reynolds* (4); *Daniell's* Chancery Practice (5).

Freeman, for the mother:—

The cases referred to do not apply. The omission in this case was immaterial. The indorsement on the copy was sufficient to inform the father to whom the order related, and it is clear that he understood it. This is a merely technical blot, which has been found out by his legal advisers.

JAMES, L.J., held that the omission was a material one, and that it rendered the service of the order ineffectual. He said that he had mentioned the point to the Master of the Rolls, who had had great experience in matters of this kind, and that he agreed with him. The order of the 12th of December must, therefore, be discharged, and the writ of attachment set aside. But no costs would be given to the applicant, for his Lordship had no doubt that he understood to whom the order referred.

Solicitors for father: *Shaw & Tremellen*, agents for *A. M. Blair, Manchester.*

Solicitors for mother: *Makinson & Carpenter.*

(1) 5 Beav. 431.
(2) 5 De G. & Sm. 338.
(3) 2 C. & M. 189.
(4) 10 W. R. 709.
(5) 4th Ed. p. 939.

M. R.

1879

Feb. 11.

SYKES *v.* BEADON.

[1877 S. 158.]

Illegal Contract—Action for Breach of—Trustee and Cestui que Trust—Breach of Trust—"Government Securities Trust"—Association of more than twenty Persons for Gain—Non-registration—Companies Act, 1862, *s.* 4—*Dividing Trust Funds by Annual Drawings—Lottery—Lottery Acts.*

No Court of Law or Equity will lend its assistance in any way towards carrying out an illegal contract; therefore such a contract cannot be enforced by one party to it against the other, either directly, by asking the Court to carry it into effect, or indirectly, by claiming damages or compensation for breach of it: though there may be some cases in which a party to such a contract may recover from a third person money paid over to that person in pursuance of the contract; and other cases in which a person may recover from the parties to such a contract moneys obtained by them from him on the representation that the contract was legal.

A "Government securities trust," or combination of more than twenty persons, formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest, with a bonus, is an "association for the acquisition of gain" within the meaning of sect. 4 of the *Companies Act*, 1862, and is, therefore, unless registered under that section, an illegal association.

Semble, the mode of distribution was a lottery, and therefore illegal under the Lottery Acts.

A member of such an association, which had never been registered under the *Companies Act*, 1862, but which was regulated by a trust deed, brought an action against the trustees named in the deed to have the trust administered by the Court, and to make the trustees liable for alleged breaches of trust whereby part of the trust fund had been lost. A demurrer by one of the Defendants, a retired trustee, was allowed, on the ground that the association was illegal, and that the trust deed therefore constituted an illegal contract which the Court would not enforce.

Sharp v. *Taylor* (1) discussed.

DEMURRER.

The statement of claim alleged as follows:—

"1. In the month of June, 1872, the following prospectus was

(1) 2 Ph. 801.

issued and advertised by the Government and Guaranteed Securities Permanent Trust:—

"Government and Guaranteed Securities Permanent Trust, 1872.

"In certificates of £100 each to be issued at £94. Rate of interest £6 per cent.

"Trustees.

"The Right Hon. *Thomas Emerson Headlam*, M.P., President.

"Sir *Cecil Beadon*, K.C.S.I.

"The Hon. *Edmund Drummond.*

"The Right Hon. Lord *Claud Hamilton*, M.P.

"*Richard Pryce Harrison*, Esq., C.S.I., late Comptroller-General of Accounts for *India.*

"*John Horatio Lloyd*, Esq.

"*Arthur Otway*, Esq., M.P.

"*Francis Webb Shields*, Esq.

"*R. W. Wilbraham*, Esq., late of Her Majesty's Treasury, *Whitehall.*

"Deposits will be received at the *Union Bank of London* on behalf of the trustees of this fund on account of subscriptions for the above scrip certificates of £100 each to the nominal amount of £1,000,000. Coupons for interest payable half-yearly on the 1st June and 1st December, and coupons for bonus will be attached to each certificate payable at the *Union Bank of London.*

In the present combination the method of average investment introduced by the Foreign and Colonial Government Trust is extended in its application with a view to greater security. The principles of the Government and Guaranteed Securities Permanent Trust are moreover distinctive, and are designed to obviate the existing and inconvenient methods of dealing with profits in reversion and to reconcile the equities of drawn and undrawn certificate holders.

"These principles accordingly embrace the permanent maintenance of the fund in its entirety, provision for reserve, the immediate distribution of each year's realized profit as bonuses in cash upon drawing, and the progressive increase of such bonuses to compensate for delay in being drawn.

"The subscriptions will be invested in carefully selected Government and guaranteed securities only, viz., in stocks or obliga-

M. R. 1879 SYKES v. BEADON.

tions of governments, states, and municipalities, and guaranteed or subsidized stocks, shares, and obligations of railways and public works. The capital of such of the several investments as become realized by the operation of their sinking funds, or otherwise, will be similarly re-invested. The trustees are bound by no existing arrangements for purchase of securities.

"While adopting the method of existing trusts of restricting any single investment to a maximum of one-tenth of the fund the present trust will fortify the security thus obtained by setting aside ½ per cent. to annual reserve. The security of average will further be permanently maintained by providing that the drawings shall not entrench upon capital. The annual drawings accordingly, which are fixed at 5 per cent. of the fund, will be drawings for the distribution of profits in bonuses and redemptions, and the certificates, when drawn, will be converted into preference dividend bonds of £100, each bearing 5 per cent. interest.

"The mode of supplying the annual bonuses is as follows:—The annual working expenses and the reserve fund having been provided, all net revenue up to 7¼ per cent. on the nominal capital after deducting £6 per cent. for fixed interest will be distributed to the holders of certificates drawn in the annual drawing. One-twentieth of the certificates issued will be annually drawn, and the bonus will therefore be twenty times £1 5*s.* per cent., or £25 per certificate.

"After the first drawing additions to bonuses will also be made by adding thereto at each drawing the year's difference of interest between that payable on the bonds and that payable on the certificates. The bonuses will consequently increase 1 per cent. every year, and compensation will thus be afforded for delay in being drawn. At the twentieth or last drawing of the series the cash bonus upon the same estimate of revenue will therefore be £45.

"All further available profit will be devoted to the extinction of bonds in the order of their issue at the rates of £200 for each £100 bond.

"An investor in the present trust will, on the above calculation, receive interest of £6 7*s.* 8*d.* per cent. until his certificate is drawn. When his certificate is drawn he will receive, first, a cash bonus of

£25 to £45 according to the year of drawing; second, a preference dividend bond of £100 bearing interest at the rate of £5 per cent., which, taking into account the cash bonus returned, is equivalent to a rate of interest varying from £7 4*s.* 11*d.* per cent. to £10 per cent. on the amount remaining of his original investment. Moreover, the holder of every certificate will, if not paid off at the rate of £200 for every £94 invested, hold an increased proportion of the entire fund.

"It will be readily seen that at the end of twenty years the whole issues will have been drawn, and the entire profits, which in other trusts accrue mainly in reversions, will have been paid in cash; and those holders of bonds who have not been further paid off at £200 per cent. will own the entire fund with its renewed reversion right unencumbered.

"The working expenses of the trust are restricted to an annual sum not exceeding in any one year one-half per cent. of the nominal amount of the fund subscribed. The trustees have signed a contract under which all preliminary expenses, inclusive of brokerage on the original purchases, stamps, advertisements, legal expenses, and all charges, are undertaken for 1½ per cent. on the nominal amount of the stocks and securities purchased.

"A general meeting will be convened within three months to nominate a committee of certificate holders and appoint auditors.

"A draft of the trust deed can be seen at the offices of the Trust . . . .

"In cases where no allotment is made the deposits will be forthwith returned in full.

"Payments by subscribers are to be made as follows:—

"£5 per certificate on application.
"£20 „ on allotment.
"£35 „ on 1st August, 1872.
"£34 „ on 1st September, 1872.

"£94 per certificate.

"Payments anticipatory of due dates will be received under discount at the rate of 5 per cent. per annum.

"Each scrip will be indorsed with the payments as made and

M. R. 1879 SYKES v. BEADON.

bear the number of the certificate for which it will eventually be exchanged.

"2. The Plaintiff having seen the before-mentioned prospectus as advertised, applied for and obtained a copy of it, with printed form of application attached, and the Plaintiff, from the terms of the prospectus, and from the position of the persons associated therewith and named therein as trustees, considered and believed the trust to be of a sound and substantial character, and applied for 200 of the certificates at £94 each, such subscription amounting to £18,800, and the Plaintiff paid the deposit of £5 on each of such certificates on application according to the terms of the said prospectus, and the whole of the said 200 certificates were immediately allotted to the Plaintiff. Shortly afterwards the Plaintiff ascertained that only about £170,000 had been subscribed out of £1,000,000 mentioned in the prospectus, and not sufficient to secure a quotation on the *Stock Exchange*, and the Plaintiff had an interview with Mr. *F. Behr*, the secretary of the said trust, and was assured by the secretary that the fund would considerably increase, and that by private influence a quotation on the *Stock Exchange* would be secured, and the Plaintiff, relying upon such assurance, paid to the bankers of the trust named in the said prospectus, the sum of £17,709, being the said sum of £18,800 less £5 deposit on each of the said certificates paid by the Plaintiff on application as aforesaid, and the discount in anticipation of the calls provided by the prospectus, and received from the bankers of the trust named in the said prospectus a receipt for the money so paid, and the Plaintiff, in or about the month of November, 1872, received from the secretary of the said trust 200 certificates for £100 each in the form in the 2nd schedule to the deed of trust hereinafter stated.

"3. The Plaintiff subsequently obtained a copy of the deed of trust referred to in the prospectus. Such deed is dated the 20th day of September, 1872, and is made between the Right Honourable *Thomas Emerson Headlam*, since deceased, the Defendant Sir *Cecil Beadon*, the Defendant the Right Honourable Lord *Claud Hamilton*, the Defendant *Richard Pryce Harrison*, the Defendant *John Horatio Lloyd*, the Defendant *Francis Webb Shields*, the

Defendant *Roger William Wilbraham* (thereinafter called the said trustees) of the one part, and the Defendant *Robert Cunninghame Cunninghame Graham* (thereinafter called the covenantee), for and on behalf of all the holders for the time being of the certificates and preference dividend bonds thereinafter respectively mentioned, of the other part, and is as follows: 'Whereas divers persons have subscribed the aggregate sum of £180,856 for the purchase by the trustees of certain stocks, shares, or securities, to be selected by the trustees, the amount invested in each security to be determined by the trustees, provided always that the maximum investment in any one security should not exceed one-tenth of the fund: And whereas the trustees have already received the sum of £172,631 15*s.* 11*d.* cash, for the purpose of investing the same in manner aforesaid: And whereas the said trustees shall be at liberty from time to time, when and as they shall think proper, to receive further subscriptions and accept transfers of stocks, shares, and securities, to be selected by the trustees, to an amount not exceeding in the whole, with the sums already subscribed as aforesaid, £1,000,000 sterling: And whereas the securities specified in the 1st schedule hereto have been already purchased and accepted by the trustees, and are now held by them to give effect to the provisions of these presents: And whereas it is intended to issue to the said subscribers certificates in the form set forth in the 2nd schedule hereto, a certificate of £100 being delivered in respect of every subscription of £94: And whereas to each of the said certificates will be attached coupons for interest after the rate of £6 per cent. per annum from the time of subscription to the 1st day of December, 1892, payable half-yearly, on the 1st day of June and the 1st day of December in each year, or until drawn for conversion as hereinafter mentioned, and also coupons for bonus as hereinafter mentioned: And whereas it is also intended to issue yearly preference dividend bonds, in lieu of such parts of the said certificates as shall be drawn for the purpose of conversion in the manner hereinafter expressed, one of such preference dividend bonds being delivered in respect of every certificate of £100, which shall be so drawn for conversion: Now, this indenture witnesseth that for divers good considerations the trustees hereunto moving, they the said trustees, and every combination of two

M. R. 1879 SYKES v. BEADON.

or more and single one of them for themselves and himself, do and doth hereby covenant jointly and severally with the covenantee, his executors, administrators, and assigns, for and on behalf of all the holders for the time being of the said certificates and preference dividend bonds, in manner following (that is to say):

"1. The trustees or the survivors or survivor of them, or the executors or administrators of such survivor, and all new trustees to be appointed as hereinafter provided (hereinafter called the trustees or trustee for the time being), shall hold the moneys received and to be received by them, and the several stocks, shares, and securities so purchased and to be purchased by the trustees as aforesaid (and hereinafter called the trust funds and securities), and all annual produce thereof, upon trust to give effect to the provisions of these presents.

"2. The trust funds and securities shall be applied in payment, in the first instance, of a percentage of one and a half per centum upon the nominal amount of the said trust funds and securities, and of any increase thereof from time to time under a contract which the trustees have entered into for the discharge of all the preliminary expenses attendant upon the formation of the trust (inclusive of any commission on the original purchases), stamps, advertisements, legal expenses, and all other charges, and subject thereto by and in the discretion of the trustees in the purchase of securities of the same or the like kind and description as those mentioned in the 1st schedule hereto, provided that not more than one-tenth part of the whole capital fund for the time being subject to the trusts hereof shall at one time be invested in or upon the same securities.

"3. The annual produce of the said trust funds and securities, and all moneys arising from profits arising in respect of any of such trust funds and securities, or any other trust funds or securities for the time being, shall be applied in manner following:—

"1st. In payment of brokerage or commission on the purchase and sale of securities from time to time, and then in payment of any sum or sums not exceeding the amount of half per centum upon the nominal amount of capital from time to time subscribed in manner aforesaid, and, subject to the trusts of these presents, in discharge of all expenses of the arrangement of the trust during

the preceding year, including all remuneration to the trustees, committee, actuaries and auditors, salaries, rent of offices, &c., and the banker's commission for payments of dividends and redemptions.

"2nd. In setting apart as a reserve or guarantee fund, to be applied for the purposes hereinafter mentioned, a sum equal to half per centum upon the amount of the nominal capital for the time being subject to the trusts.

"3rd. When and so soon as any certificates shall have been drawn and converted into preference dividend bonds, in payment of interest to the holders of such bonds at the rate of two pounds per centum per annum half-yearly, as herein mentioned.

"4th. In payment of interest at the rate of £6 per centum per annum on the amount of the outstanding certificates for the time being to the holders thereof for the time being half-yearly as herein mentioned.

"5th. In payment, by way of bonus to the holders of such and so many of the said certificates as shall be drawn each year for conversion into preference dividend bonds, of the surplus profit (if any) of the year which shall remain after making the payments aforesaid, up to but not exceeding $8\frac{1}{4}$ per centum upon the said nominal capital for the time being.

"6th. In payment, by way of further bonus to the holders of such and so many of the said certificates as shall be drawn for conversion into preference dividend bonds each year, of the difference of interest upon the preference dividend bonds and in the outstanding certificates.

"7th. In the redemption, in the order of their date and issue, of the preference dividend bonds, out of surplus profits in excess of $8\frac{1}{4}$ per centum (if any), at the rate of £200 for every £100 bonds, so as to extinguish the same for the benefit of the holders of the remaining bonds and certificates (if any).

"4. The reserve fund to arise as hereinbefore mentioned shall be applied by the trustees as they in their discretion shall think fit, either in recouping the capital any losses which may be sustained by the trust funds or to making good any deficiency of the annual profits for payment of interest on the preference dividend bonds and certificates, or to provide for such bonuses as aforesaid as hereinafter mentioned.

M. R. 1879 SYKES v. BEADON.

"5. All holders of certificates and of preference dividend bonds respectively shall, as between members of the same class, have equal rights without regard to priority of date of issue or otherwise, except as aforesaid.

"6. The trustees shall make their payments of interest half-yearly, on the 1st day of June and the 1st day of December in every year, a proportionate sum being paid in respect of the proportion of any half-year between the date of subscribing for and paying the sums payable in respect of any certificate, and the 1st of June or December (as the case may be) then next ensuing.

"7. If in any year the annual produce of the trust funds and securities and all profits arising from the sale, payment, or redemption of any such securities shall, after payment of all expenses as aforesaid, be insufficient for payment of interest at 5 per centum per annum as aforesaid on the nominal amount of the said preference dividend bonds for the time being, the trustees may apply in or towards making good the deficiency the whole or such part as they may think fit of any reserve fund then existing, and the moneys which are or shall so become available shall be divided amongst the holders of such preference dividend bonds *pari passu*, and the deficiency (if any) which shall then exist for payment of the said £5 per centum interest shall remain as a first charge upon and to be paid out of the future income or profit of the said trust fund, and in case, after payment of such interest, the funds available for payment thereof shall be sufficient for payment of interest at £6 per centum per annum as aforesaid on the nominal amount of the said certificates outstanding for the time being, the available moneys, and such other part (if any) of the reserve fund as the trustees shall think fit so as to apply, shall be divided amongst the holders of the certificates *pari passu*, provided that no part of the reserve fund or future income or profit of the said trust fund shall be applied in payment of interest on the said certificates until and unless interest on the said preference dividend bonds shall have been fully paid. Provided also that the said trustees may also, if they shall think fit so to do, apply any further part of the said reserve fund, after making the payments aforesaid, as if it were income for the year, in making good or providing such bonuses as hereinbefore respectively mentioned.

"8. The certificates to be converted into preference dividend

bonds in each year shall be selected by lot in the presence of a notary public, and the preference dividend bonds issued in lieu thereof shall be numbered in the order in which the certificates in respect of which they shall be issued were drawn. The selection shall be made in the month of December of each year, at 12 o'clock at noon, on such day and at such place as the trustees shall appoint, notice thereof being given in three *London* daily papers at least one week previously, and any holder of a certificate may attend, and the first selection shall be made in December, 1873. The trustees or trustee present on each such selection shall superintend the selection by lot, and the result of such meeting for selection shall be recorded in a book kept for that purpose, which shall be open for the inspection of the holders of certificates, and shall also be advertised in three *London* daily papers not later than two days after the actual selection (if not a Sunday), and for three days in the following week.

"9. If any holder of a certificate shall so require, the notary public present at such selection shall make a statutory declaration of the result of such selection by lot.

"10. No certificate shall carry interest after it has been drawn for conversion, whether the preference dividend bonds to which the holders shall be entitled in lieu thereof shall be demanded and received by its holder or not.

"11. So soon as all the certificates shall in manner hereinbefore provided have been converted into preference dividend bonds as aforesaid, the trust funds and securities then remaining subject to the trusts of this deed shall be and be deemed the property of the holders of the then existing preference dividend bonds in the proportion of the nominal value of the amount of preference dividend bonds held by them respectively, and unless a majority representing two-thirds in value shall determine to realize and divide the same, a new issue of certificates of the number and amount aforesaid to the amount of the nominal trust fund shall be made to the holders of the said preference dividend bonds in proportion to the nominal value of their respective holdings, and all the provisions of these presents shall apply to such new issue of certificates in the same manner as if a new trust fund had been constituted upon the terms and conditions hereinbefore contained.

M. R. 1879 SYKES v. BEADON.

"12. The reserve fund and all annual produce, and all moneys arising from profits arising from the sale, payment, or redemption of any of the trust funds and securities may, if the trustees shall so think fit, until the same shall be required as cash for the purposes of these presents, be invested in the purchase of Government or *India* stocks or funds, exchequer bills, or any other easily convertible securities, or be placed at a deposit account in the names of the trustees for the time being in the Bank of *England*, or at some other bank, and any interest arising from such interim investment shall be dealt with as part of the annual produce of the trust fund and securities.

"13. The securities for the time being of the trust funds shall be deposited in the names of the trustees and kept at the *Union Bank of London*, or some other bank to be named by the trustees and approved by the committee of certificate and bondholders, and the dividends and redemption moneys shall be received by the said *Union Bank of London*, or such other bank as aforesaid."

"16. None of the securities on which the trust funds shall be from time to time invested shall be sold or otherwise converted into money, except by means of their payment or redemption, unless by the resolution of two-thirds of the trustees present at a meeting of the trustees, and confirmed at a special meeting of the trustees called with express notice of the object, at which there are present not less than three trustees, by a resolution passed by a similar majority present at such meeting.

"17. The produce of every such conversion as aforesaid, and the deposits, if any, forfeited for non-payment of the amounts to be paid on allotment, shall be applied in the same manner as capital, or moneys arising from the payment or redemption of any of the trust funds or securities, save that any profit realized on such sale or conversion may be treated as part of the nominal profits."

The remaining clauses of the deed provided for the appointment of a manager; for the holding of public meetings; for the appointment of new trustees; and for the indemnity and reimbursement of trustees.

The first schedule to the deed comprised twenty different descriptions of stocks of the total nominal value of £260,267 10*s.*,

and consisting of securities of the Egyptian, Spanish, and many other foreign governments.

"4. The said deed is executed by all the parties thereto. The total subscription, which is stated in the said trust deed as then amounting to £180,856, was afterwards increased to £207,000, at which it now stands, and the trustees of the said deed succeeded in obtaining a quotation on the *Stock Exchange*, but the prices of the certificates rapidly declined, and the Plaintiff (Sir *Frederick Henry Sykes*, Bart.) sold at a great sacrifice certificates of the nominal value of £3,800. After their sale the Plaintiff was the holder of certificates of the nominal value of £16,200. Of these last-mentioned certificates nineteen have under the provisions of the said trust deed been drawn and converted into £5 per cent. preference bonds, and the Plaintiff is now the holder of the following certificates and preference dividend bonds of the said trust:—

"19 £5 per cent. preference dividend bonds . . .	£1900
And 143 £6 „ certificates .	14,300
	£16,200

"5. The value of the said certificates continued to fall very rapidly, but quotations continued to appear for about two or three years, when they suddenly ceased, and the said trust has now entirely vanished from the money market, and has ceased to be quoted in the official lists of the *Stock Exchange* and in the public newspapers, and the certificates are now altogether unmarketable."

"6. According to the said prospectus there were to be nine trustees, whose names are printed at the head of such prospectus, but seven only were appointed by the said trust deed. The Honourable *Edmund Drummond* and *Arthur Otway*, Esq., mentioned in the said prospectus as trustees, were not parties to the said deed, and there are now only five acting trustees of the said deed, namely, the Defendants Sir *Cecil Beadon*, *Richard Pryce Harrison*, *Roger William Wilbraham*, *Francis Webb Shields*, and Sir *William Palliser*. Of the last-named Defendants the first four are parties to and have executed the said trust deed. The Defendants Lord *Claud Hamilton* and *John Horatio Lloyd* have, it is alleged, retired from the trust. They, however, executed the said deed of the 20th

M. R. 1879 SYKES v. BEADON.

day of September, 1872, and acted as trustees thereof from the date of that deed until they retired, if they have retired. . . . . The Right Honourable *Thomas Emerson Headlam* continued to act as trustee of the said trust deed down to the time of his death, which happened in the year 1875. He made a will dated 24th May, 1875, and thereby appointed the Defendant *Ellen Percival Headlam* sole executrix thereof. . . ."

13. In December, 1876, a committee was appointed to investigate the affairs of the trust, and shortly afterwards they issued a report, which, after stating the depreciation and loss that had taken place in the trust capital, proceeded as follows:—

"One main cause of this disaster arises from the character of the trust securities, which must necessarily be of a precarious nature when it is considered that upwards of 8 per cent. has to be averaged from these investments to meet the demand of the trust upon its income.

Another cause is doubtless the unprecedented defaults and consequent depreciation which have occurred in the inferior class, and to some extent in the better description of American and other foreign stocks and railway property.

"Hazardous as such property is to hold, a change of securities is another source of serious loss, and whether we consider it due to want of judgment on the part of the trustees, or to the inevitable loss from dealing in stocks held often by practised speculators, occasionally, we believe, without the advice of their broker, or more probably from both causes combined, we find an actual loss of £24,000 has accrued from these proceedings."

The report then contained various suggestions with a view to the winding-up of the trust.

"18. The number of certificate and preference bondholders of the said trust is, so far as the Plaintiff has been able to ascertain, about 400. Many of these are small holders holding from one to five certificates or bonds only. The Plaintiff has been unable to ascertain the names and addresses of the said certificate and bondholders of the said trust other than himself, and they are far too numerous to be made parties to this action. The Plaintiff is the largest holder of certificates and bonds of the said trust.

"19. The reserve fund, money, and other profits referred to in

clauses 3 and 12 of the said trust deed, were and have, and, as the Plaintiff submits, contrary to and in breach of the provisions of the said trust deed, been invested by the Defendants the trustees, and the late *Thomas Emerson Headlam*, and the Defendants Lord *Claud Hamilton* and *John Horatio Lloyd*, in American railways and similar speculative securities, and in consequence of this the money required for payment of the coupons was not forthcoming when the coupons became due, and the Defendants the trustees and the late *Thomas Emerson Headlam*, and the Defendants Lord *Claud Hamilton* and *John Horatio Lloyd* were obliged to sell out and did sell out some of the capital securities of the trust to enable them to pay the coupons, and down to December, 1873, the Defendants the trustees and the late *Thomas Emerson Headlam*, and the Defendants Lord *Claud Hamilton* and *John Horatio Lloyd*, invested £14,000 of the reserve fund, moneys, and other profits in the before-mentioned speculative securities, and there has been a loss upon such investments to the extent of several thousand pounds. . . .

"20. With respect to the loss of about £24,000 referred to in the said report of the said committee as the result of dealing with the trust funds, the sales of securities by the Defendants the trustees, and the late *Thomas Emerson Headlam*, and the Defendants Lord *Claud Hamilton* and *John Horatio Lloyd*, on such dealings have been numerous, but notwithstanding this there have been only two or three special meetings held for the purpose of confirming sales, and in those cases no express notice of the object of the meeting was previously given as required by the said trust deed, and the result of these sales and conversions has been a loss to the trust of about £24,000, and the Plaintiff submits that such sales and conversions were contrary to and in breach of the provisions of the said trust deed.

"21. The said trust is incapable of being administered and carried on for the purposes for which it was instituted, and has entirely failed of its objects, and such trust and the affairs thereof ought to be wound up and closed, and the remaining assets realized and distributed amongst the Plaintiff and the other persons respectively entitled thereto, at such time and in such manner as the Court may think fit to direct.

M. R. 1879 SYKES v. BEADON.

"22. The Defendants the trustees and the Defendant *Ellen Percival Headlam*, or the legal personal representatives of the late *Thomas Emerson Headlam*, and the Defendants Lord *Claud Hamilton* and *John Horatio Lloyd*, ought to be ordered to make good the losses occasioned to the trust as stated in paragraphs 19 and 20, and also in the before-stated report of the said committee."

The Plaintiff accordingly claimed, 1, to have the trusts of the said indenture of the 20th of September, 1872, administered under the direction of the Court, and if and so far as might be proper to have such trusts and the affairs of the trust wound up and closed, and the assets realized and distributed amongst the Plaintiff and the other persons entitled thereto, and to have the rights and interests of the Plaintiff and all such other persons ascertained and declared: also, 2, to have it declared that the Defendants other than the Defendant *Robert Cunninghame Cunninghame Graham* were liable to make good the losses occasioned to the trust by and in consequence of the alleged breaches of trust: and, 3, a receiver.

The action now came on upon a demurrer by the Defendant *John Horatio Lloyd* to the statement of claim for want of equity. It was admitted at the Bar by the Plaintiff's counsel that the Defendant *Lloyd* had retired from the trust about five years ago, and had since altogether ceased to have any active connection with it: that the association had never been registered under the Companies Acts: and that its members had always exceeded twenty in number.

Macnaghten, for the demurrer:—

This is an "association consisting of more than twenty persons for the acquisition of gain" within the meaning of sect. 4 of the *Companies Act*, 1862, and, not having been registered under that section, is an illegal association. The contract created by the prospectus and the trust deed is therefore an illegal contract which cannot be enforced, and out of which no right of action can arise either at law or in equity: *Thomson* v. *Thomson* (1); *In re South Wales Atlantic Steamship Company* (2); *In re Arthur Average*

(1) 7 Ves. 470. (2) 2 Ch. D. 763.

Association (1). Moreover, the Defendant *Lloyd* has long since ceased to have any connection with or interest in the trust, and his liability has therefore ceased.

[He was stopped by the Court.]

Chitty, Q.C., and *Nalder*, for the Plaintiff:—

We submit that this is not an "association for the acquisition of gain" within the meaning of the 4th section. It is in terms a trust, not an association for carrying on business for gain. Its nature is shewn by the trust deed, which is, in substance, a deed of settlement; that is to say, the trustees are to stand possessed of the "trust funds," that is, the subscriptions, upon trust for investment, with power of varying investments, and for division in a certain specified manner among the *cestuis que trust*, namely, the subscribers. It is, no doubt, a settlement of an elaborate kind, but still it is a settlement only. The duty of the trustees was merely to receive the subscriptions and invest them, just as in the case of ordinary trustees of a settlement, who, in selecting investments which may prove advantageous to their *cestuis que trust*, cannot be said to be "carrying on a business for the acquisition of gain." Under these circumstances, we submit it was unnecessary to register the association under the Act: it is therefore a legal association, this trust deed is a legal contract, and *Lloyd* is responsible, as one of the trustees, for the losses incurred during his tenure of office.

[JESSEL, M.R.:—I have grave doubts whether this association is not illegal as being within the prohibition of the Lottery Acts.]

If this is a lottery, then building societies are lotteries.

[JESSEL, M.R.:—Building societies are in a different position: they are loan societies. In an association such as this it is not a case of loans to be returned, but of subscriptions to be divided. The subscriptions are to be divided among the subscribers by drawings by lot, and the prize is a bond with a bonus. It looks to me very like a lottery. All I can say is, people who enter into associations of this kind will have to consider the Lottery Acts.]

Even assuming it is an illegal trust, it is not competent for

(1) Law Rep. 10 Ch. 542.

M. R. 1879 SYKES v. BEADON.

the trustees to set up its illegality against their *cestuis que trust*: *Sheppard* v. *Oxenford* (1). Applying the law of partnership to this case, one of two partners in a firm cannot set up a supposed evasion of the law as a defence to a claim made upon him by the other partner for partnership property of which the one partner has possessed himself: *Sharp* v. *Taylor* (2); *Tenant* v. *Elliott* (3); *Lindley* on Partnership (4).

Again, if the association required registration under the *Companies Act*, it was the duty of the trustees, all of whom, with the exception of *Palliser*, were named in the prospectus, and were in reality the promoters of the association, to have seen that it was duly registered. Therefore, notwithstanding the omission to register, the Plaintiff, as a member of the association, is entitled to claim back his money from these trustees, on the principle that a man cannot aver any wrong or omission of his own as an answer to such a claim: *Butt* v. *Monteaux* (5).

As regards the alleged breach of trust, we submit that the trustees were not justified in investing the reserve fund in speculative securities, for, according to the true meaning of clause 12 of the trust deed, the investments of the reserve fund were to include securities of the British Government only, and not of foreign governments. Indeed, by his demurrer *Lloyd* admits the breach of trust alleged in paragraphs 19 and 20 of the statement of claim: and the fact that he has ceased to have any connection with the trust will not be a bar to proceedings against him in respect of such breach: *Middleton* v. *Chichester* (6).

JESSEL, M.R.:—

This is an action founded on a statement of claim which is of the most elaborate character, but the substance of which is an action by the Plaintiff, Sir *Frederick Henry Sykes*, Bart., seeking to carry into effect, under the direction of the Court, what are called the trusts of an indenture dated the 20th of September, 1872. The claim is as follows:—[His Lordship read it.] The

(1) 1 K. & J. 491, 496.
(2) 2 Ph. 801, 818.
(3) 1 B. & P. 3.
(4) 3rd Ed. pp. 209 *et seq.*
(5) 1 K. & J. 98, 123.
(6) Law Rep. 6 Ch. 152.

Defendant *John Horatio Lloyd* has put in a general demurrer for want of equity; and the contention before me is that what is called the trust is, in fact, an illegal contract, prohibited by statute, and which therefore cannot be enforced in any Court of Law or Equity.

It appears, partly by the statement of claim, and partly by admissions made at the Bar, and the case has been argued on tha footing, that Mr. *John Horatio Lloyd* was originally a trustee, but that some years ago—it is said five years ago—he retired from the trust, and has since had nothing to do with the matter at all. This is not so clearly stated in the statement of claim as it might be; but any deficiency of allegation in that respect has been cured by the admissions at the Bar, and I will therefore treat Mr. *John Horatio Lloyd* as having no more to do with the matter at the present moment than any stranger. Therefore, as against him, this is certainly a claim to make him liable for breach of trust, or breach of duty, in not carrying out the provisions of the contract alleged to be illegal; or, to put it in plain language, if the contract is illegal, this is in the nature of an action for damages for breach of an illegal contract. I shall have to go a little more into detail as to the nature of the contract, and as to the allegations against Mr. *Lloyd*, before I give my reasons for thinking, as I do, that the contract is really an illegal contract.

Now the objection which has been raised before me on behalf of Mr. *Lloyd* is to the effect that the contract was between persons more than twenty in number (indeed the statement of claim says they are 400 in number, and it is admitted that they were more than twenty in number at all times) to form an association for the purpose of gain. The words of the 4th section of the Act are these: "No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament or letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, associa-

M. R. 1879 SYKES v. BEADON.

tion, or partnership, or by the individual members thereof, unless it is registered as a company under this Act;" and so on.

I am not about to add anything to the judgment which I delivered in April, 1875, in the case of the *Arthur Average Association* (1), as to what the proper construction of that section of the Act is. The only point I have to consider is, whether this is an association or company formed for the purpose of gain either by the association or by the individual members thereof; and I have no doubt whatever that it is both—that is, that it is formed for the purpose of gain by the association and also by the individual members.

A second point, which was not argued, but which struck me during the argument, is, whether the contract is not also illegal as being within the prohibition of the Lottery Acts. Upon that second point I will not give a final opinion, because it has not been argued, but I will state my impression and the reasons for that impression.

As regards the first point, it is necessary to consider what the nature of the association was. Now, in this respect, the statement of claim is as full and as explicit as possible; because it tells us how the association was originated and how it was carried out. It, first of all, states the prospectus, and then the deed executed in pursuance of the prospectus. Mr. *Chitty*, in argument, wished me to look at the deed only; but that is not the correct way of viewing the matter. In order to ascertain what the association is for, you must really begin with the prospectus, on the faith of which the Plaintiff subscribed; and then, if you have ascertained it to be illegal, the mere fact that they did by a deed endeavour to cover the illegality would not save the parties to the transaction from the consequences of such illegality, even if they had succeeded, which I do not think they have, in covering the illegality by the terms of the deed.

The prospectus was issued in the month of June, 1872, and it was issued and advertised in this form:—[His Lordship read the prospectus, observing that the word "combination" was equivalent to "association," and continued:—] I may mention that it is not plain on the prospectus alone, but it is perfectly plain if you

(1) Law Rep. 10 Ch. 542.

look at the deed of trust, that it is intended that the investments may be changed by sale and converted into other investments from time to time.

I stop for the moment at the prospectus, without looking at the details of the deed of trust, because this is the association to which the Plaintiff says he subscribed a very large sum upon the faith of that prospectus. Now, is this an association of persons for the purpose of gain collectively and individually? It is so, in the most express and explicit terms. They tell us they are going to make a profit; and how? By investing the money in the purchase of various stocks; and, as I said before, on the terms of the trust deed, which I shall refer to, they can sell them again at a profit, if they wish, or they can keep them until they are paid at a higher price than the purchase-money by the Government or the person who is liable to pay the higher rate, and out of the money they receive either from the dividend or from the redemption or sale-moneys, they divide what would be, if the prospectus had been carried out, certainly a very large profit indeed amongst the individual subscribers.

The people who issued this prospectus made no mistake as to what they intended to do. They talk of profits as profits from beginning to end, and tell you how they are going to divide the profits. There is no concealment: and there is no pretence of the company being founded for any philanthropic or charitable purpose, or for the promotion of science or art, or anything save and except the obtaining of large profits for the association by the dealing in stocks, and dividing that profit amongst the individual subscribers, who would perhaps thus gain a very large income instead of a very moderate income. For my part I should have thought the question was absolutely unarguable, had it been stated without anything further.

Then I was referred to the deed. It was supposed that the deed would, in some way or other, help the Plaintiff's case. I find nothing in the deed to contradict the terms of the prospectus. Indeed it carries it out more fully. [His Lordship then proceeded to read the deed, and, after reading down to the end of clause 2, continued:—] Now I am going to read the descriptions of stock, for it is as well to know, with reference to this alleged breach of

M. R. 1879 SYKES v. BEADON.

trust, what the stocks are. The stocks are thus described:—[His Lordship read the list of securities given in the 1st schedule to the deed.]

Those are all the securities. I have read every one of them, because it is useful to recollect what they are when one comes to consider the meaning of another clause, the 12th. The 2nd clause, which I have read, says that the trust funds are to be invested in the "purchase of securities of the same or the like kind and description." I think that is not quite an usual trust for investment, or one that we should expect to find in an ordinary settlement, as was suggested to me by Mr. *Chitty* in argument. [His Lordship then continued reading the deed down to the end of clause 3.]

Now I pause there for a moment, because I want to see what the position of the holders of the certificates is, and what their rights are. It is clear, as I read it, and as I shall shew presently, that they are entitled to have their certificates drawn. Now how? Clauses 8 and 9 are these:—[His Lordship read them.] As I read that, as I said before, not intending to decide the point, because it has not been argued, but stating my opinion so far as I ought to state it—this is a lottery, and is illegal under the Lottery Acts. The holders of certificates are persons who subscribe money to be invested in funds which are to be divided amongst them by lot, and divided unequally. That is, the persons who get the benefit of the drawings get a bond bearing interest and a bonus which gives them different advantages from the persons whose certificates are not drawn, and it depends upon chance which gets the greater or the lesser advantage. It is, therefore, a subscription by a number of persons to a fund for the purpose of dividing that fund between them by chance and unequally.

If that is not a lottery it is very difficult, at all events to my mind, to understand what a lottery is. It is called a division by lot, which means lottery. It says that the selections of certificates shall be by lot, and that is to be done in the ordinary way, by chance, and the benefits, as I said before, are unequal; and if that is so, the scheme is illegal on that ground as well as on the ground which has been argued.

Then there is a provision, clause 7, which is probably one that

was wanted to provide for some of these funds failing. The subscribers to that scheme, although evidently of a sanguine temperament, were not so sanguine as not to see that some or other of these foreign governments might omit the ceremony of paying their dividends: and consequently in the 7th clause we find this:—[His Lordship read the clause.]

Then there is the 12th clause, as to what is to become of the reserve fund, which states this:—[His Lordship read it.] It was argued before me, on that clause, that the trustees were only entitled, under the words "or any other easily convertible securities," to invest in something like Government or *India* stock or Exchequer bills. Now the word "government" there does not necessarily mean the British Government. These people dealt with all sorts of governments except the British Government; they dealt with the Government of Egypt and the Government of Spain. It does not by any means follow that they meant by "government securities" anything more than they said—the securities of some government; and in the next place, I am satisfied that the words "or any other easily convertible securities" cannot be restricted, and was not intended to be restricted. It meant what it said, "or any other easily convertible securities;" and everybody knows that those securities mentioned in the first schedule are, as regards the great bulk of them, very easily convertible indeed; in fact, the more depreciated a security is, the more easily convertible it is, generally speaking, although of course it is sold for a much smaller sum.

Then the 16th clause says this:—[His Lordship read it.] I think that is all I need read of the trust deed.

I now come to the allegations affecting Mr. *Lloyd*. Mr. *Lloyd*, as I said before, retired from the trust about five years ago, and what it is said he did is this. The 19th paragraph of the statement of claim states as follows:—[His Lordship read it.] As I said before, I cannot see any breach of trust alleged there. There is nothing to prohibit speculative securities. All that is required is, that they should be easily convertible; and it is not alleged that these were not easily convertible.

Then paragraph 20 states this:—[His Lordship read it.] Now the observation I made upon that during the argument, and which

M. R. 1879 SYKES v. BEADON.

I repeat, is that there is no clear allegation of breach of trust. That loss may have arisen by dealings, that is, by bad investments; but it by no means follows that they were made by sales under the 16th clause. They may have been investments made within the exception, and the exception is "payment or redemption." I do not want to imagine as a fact that they were; but I am only dealing with the allegation, and the allegation does not bring it within the prohibition of the deed. As I said before, I should guess they were; but on demurrer one must not guess. The Plaintiff must make an allegation which is clear. That is a very narrow ground to take; but I notice it, because in case I should think proper to give leave to amend, I ought to point out that the Plaintiff's allegations are not such as on demurrer would entitle him to complain of anybody, least of all of a person who is no longer a trustee.

That, then, being so, of course I ought to allow the demurrer, unless the Plaintiff is entitled to some relief against Mr. *Lloyd*, assuming, as I do in this part of my judgment, that the contract is illegal either on one or both of the grounds I have mentioned.

But it is said that, even in that case, he can have some relief against Mr. *Lloyd*. Now I do not think he can. Mr. *Lloyd* has no longer any part of the trust funds in his possession. It is admitted that he has retired. He is not alleged to be a certificate-holder, or to have anything to do with the trust funds, or with any proposed distribution of the actual remaining trust funds. He is not wanted for any such purpose. All he is wanted for is to make him liable for a supposed breach of trust in dealing with trust property; that is, to make him liable for not having invested moneys under an illegal contract, and kept them invested intact. His answer is very simple. The object of the action is, in substance, to make him liable in damages for breach of this illegal contract; and that cannot be done. It was tried in argument to put it in this way, as if the trust funds which had been sold out (for the purpose of argument I assume them to have been sold out, and it is so alleged) had been the actual trust funds of the Plaintiff, and transferred to Mr. *Lloyd;* but that is not so. All the Plaintiff subscribed was money: and the trust fund arose out of the very contract which was in itself illegal. Part of this illegal

contract was to invest the money in this very trust fund: so that it is neither more nor less than what I have stated—an attempt to make a man liable in damages for breach of an illegal contract, which cannot be done.

I will now refer to several authorities to shew that the claim cannot be maintained: it may possibly be maintained against persons other than Mr. *Lloyd*, but that I do not care about. I suggest, for the consideration of the Plaintiff's advisers, that if they think of maintaining it against any other person they must very materially alter the frame of their statement of claim. According to my opinion, it cannot be maintained in this shape, that is, to have the trusts of the deed administered; in other words, to have this illegal contract carried out. Whether or not it could be maintained on the assumption that the trusts are not to be carried on, but that the Defendants are to be enjoined from carrying on any further trusts, or so-called trusts, and ordered to divide what remains of the property amongst the subscribers, I do not say; but if it could be maintained at all, it could only be maintained upon some such ground as that.

Now, the authorities on the subject seem to be quite plain when you come to examine them. They are really to this effect, that you cannot ask the aid of a Court of Justice to carry out an illegal contract; but in cases where the contract is actually at an end, or is put an end to, the Court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons on the representation that the contract was legal, from keeping that money.

In the cases that were referred to, the first to be noticed is the case of *Thomson* v. *Thomson* (1), a decision of Sir *William Grant's*. He says: "The defence is very dishonest: but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods; and keeps them; but refuses to pay for them. So in the underwriter's case, an insurance contrary to the Act of Parliament, the brokers had received the money, and refused to pay it over; and it could not be recovered. No matter, who complains of it: the thing is illegal. You have no claim to this money except through the medium of an illegal

(1) 7 Ves. 470.

M. R. 1879 SYKES v. BEADON.

agreement; which according to the determinations you cannot support."

Now, I apply that exactly here. You have no claim against Mr. *Lloyd* to compel him to make good the loss, except through the medium of this illegal agreement or contract.

A distinction has been drawn between the case of one of two parties to an illegal contract suing the other party, and the case of his suing a third person for money received under the contract. This distinction is illustrated by the two cases of *Tenant* v. *Elliott* (1) and *Farmer* v. *Russell* (2), both of which are of a totally different character to the present case. In *Tenant* v. *Elliott* there was an illegal contract between the Plaintiff and a third person. The Defendant received money from that third person to the use of the Plaintiff. In an action by the Plaintiff against the Defendant to recover the money, it was held that, although the Plaintiff could not have forced the third person to pay under the illegal contract, yet he was entitled to sue the Defendant, and that he, the Defendant, could not set up the illegality of the contract, having received the money for the use of the Plaintiff.

The case of *Farmer* v. *Russell* was a similar case. The case was a very odd one. There was an illegal contract between the Plaintiff and a third person at *Portsmouth* to deliver certain goods, counterfeit halfpence, to that third person. The Defendants were carriers employed by the Plaintiff to deliver the goods and to receive the money, which they did. In an action by the Plaintiff against the carriers to recover the money it was said that the original contract being illegal they could not be compelled to pay; but it was decided against them, because the money had been paid over to them at *Portsmouth* for the Plaintiff's use, and it was held, upon the same principle as in *Tenant* v. *Elliott*, that the Defendants could not retain the money.

A similar point, although not quite the same, came before Lord *Cottenham* in the case of *Sharp* v. *Taylor* (3); it is as well to observe what he said about it. The question there was whether certain sums of money earned contrary to the English navigation laws could be kept by the Defendant. Lord *Cottenham* says

(1) 1 B. & P. 3. (2) 1 B. & P. 296.

(3) 2 Ph. 801.

this (1): "But the answer to the objection appears to me to be this—that the Plaintiff does not ask to enforce any agreement adverse to the provision of the Act of Parliament. He is not seeking compensation and payment for an illegal voyage: that matter was disposed of when *Taylor* received the money; and the Plaintiff is now only seeking for payment of his share of the realized profit. The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a parliamentary provision, supposed to be beneficial to the shipowners of this country; an evil, if any, which must remain the same, whether the freight be divided between *Sharp* and *Taylor*, according to their shares, or remain altogether in the hands of *Taylor*."

Of course that observation does not apply where you seek to enforce a transaction which is illegal. Then Lord *Cottenham* goes on to say—"As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can shew that, in realizing it, some provision in some Act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by shewing that there was some irregularity in passing the goods through the Custom House? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the Court is asked to do, as between the parties."

I must say, speaking with some hesitation, as I always do, when differing from any judgment of Lord *Cottenham's*, that that reasoning, to my mind, is inconclusive and unsatisfactory. The notion that because a transaction which is illegal is closed, that therefore a Court of Equity is to interfere in dividing the proceeds of the illegal transaction, is not only opposed to principle, but to authority—to authority in the well-known case of the highwaymen (2) where a robbery had been committed, and one

(1) 2 Ph. 817.

(2) *Everet* v. *Williams*, *Lindley* on Partnership, 3rd Ed. p. 188, note.

M. R. 1879 SYKES v. BEADON.

highwayman unsuccessfully sued the other for a division of the proceeds of the robbery.

So in the case he puts of one of two partners engaged in merchant trade. As I read it, he meant the trade of smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say certainly not. It is not sufficient to say that the transaction is concluded as a reason for the interference of the Court. If that were the reason, it would be lending the aid of the Court to assert the rights of the parties in carrying out and completing an illegal contract. If the partnership is for the purpose of smuggling, that is an illegal contract, and the Court cannot maintain it, and the Court will not lend its aid at all to it. That reasoning, then, of Lord *Cottenham's* is not sufficient; and I should have answered the question—not as Lord *Cottenham* does, in the affirmative—but in the negative. I do not say that this observation at all affects the authority of *Sharp* v. *Taylor* (1) as it stands; but I think it does affect very much the *dicta* which I have read from the judgment; and that is the reason I have read them. It is no part of the duty of a Court of Justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other.

I gave an illustration which occurred in my own practice in early life. One of the partners in a gaming-house sued the other partner for an account of profits. It did not come on for hearing, because the Plaintiff thought better of it; but I am satisfied that if it had come on the bill could not have been maintained. Still the assertion of the bill was, that the gaming-house had been closed, and the Plaintiff asked for an account on that footing.

Then Lord *Cottenham* goes on in *Sharp* v. *Taylor* to say, "Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tenant* v. *Elliott* (2) and *Farmer* v. *Russell* (3), and recognised and approved

(1) 2 Ph. 801. (2) 1 B. & P. 3.
(3) 1 B. & P. 296.

by Sir *William Grant* in *Thomson* v. *Thomson*" (1). Yes; but not in that way. I have already explained what those cases were. Those were not cases in which one of the two parties to the illegal contract sought to recover from the other a share of the proceeds of the illegal contract. Then he goes on to distinguish *Sharp* v. *Taylor* (2) in a way which probably distinguishes it from cases which would be open to exception on the ground of criminality.

Those are all the authorities to which I think it is necessary to refer. I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the Court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it.

It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract; and it does not follow that you cannot, in other cases, obtain, even from the parties to the contract, moneys which they have become possessed of by representations that the contract was legal, and which belonged to the persons who seek to recover them; but I am bound to say I think there is no pretence for saying that an illegal contract will in any way be enforced or aided by a Court of Law or Equity; and therefore I feel bound to allow this demurrer, which I do, with costs.

Chitty said that, having regard to his Lordship's decision upon the point of illegality, it would be useless to ask for leave to amend the statement of claim.

Solicitors for Plaintiff: *Faithfull & Owen*, agents for *J. G. Langham, Uckfield.*

Solicitors for Defendant *Lloyd: Hargrove & Co.*

(1) 7 Ves. 470. (2) 2 Ph. 801.

M. R.

1879

Feb. 15.

In re FRESHFIELD'S TRUST.

Equitable Chose in Action—Assignment—Notice—Second Assignment by Legal Personal Representative of Cestui que Trust—Priority—Purchaser without Notice.

Upon the principle in *Dearle* v. *Hall* (1), the right to priority which a second assignee of an equitable interest in a fund, who has given notice of his assignment to the trustees, possesses over a first assignee who has failed to give notice, subsists equally where the second assignee has taken his assignment from the legal personal representative of the *cestui que trust*, and not from the *cestui que trust* himself.

A. assigned to *B.* his equitable interest in a fund under the will of *X.*, but omitted to give notice to the trustees. *A.* died, having by will bequeathed all his property to his executrix, who then assigned to *C.*, a purchaser for value without notice of the prior assignment, all the property under the will of *X.* to which she was entitled as *A.*'s legal personal representative, and *C.* thereupon gave notice of his assignment to the trustees of *X.*'s will. Afterwards the representatives of *B.*, who had died, gave similar notice of his assignment:—

Held, that the fund belonged to *C.*, he having been the first to give notice.

Adjourned Summons.

Allen Freshfield, being equitably entitled to a share of the residuary estate bequeathed by the will of his uncle *Frederic Freshfield*, deceased, by an indenture dated the 18th of March, 1874, assigned all his goods, chattels, personal estate and effects whatsoever and wheresoever, of or to which he or any person or persons in trust for him then was or were in anywise possessed or entitled, to his brother *Philip William Freshfield*, his executors, administrators, and assigns, by way of mortgage to secure the repayment to the said *P. W. Freshfield* of the sum of £643 5*s.* 4*d.* and interest.

No notice of this assignment was given by *P. W. Freshfield* to the trustees of the will of *Frederic Freshfield*. *Allen Freshfield* died in August, 1874, having by his will bequeathed all the real and personal estate whereof or whereto he or any person or persons in trust for him should at his death be possessed or entitled, or

(1) 3 Russ. 1.

which he could dispose of by will, unto his wife *Mary Frances Freshfield*, whom he appointed his executrix.

By an indenture dated the 7th of May, 1875, the said *Mary Frances Freshfield*, in consideration of the sum of £75, assigned the share and interest under the will of *Frederic Freshfield* to which she was entitled as the legal personal representative of *Allen Freshfield*, to *Theophilus Hulm* absolutely.

Hulm had not at that time notice of the prior assignment to *P. W. Freshfield*.

On the 13th of May, 1875, *Hulm* gave notice of his assignment to *Frederic Freshfield's* trustees.

On the next day the executors of *P. W. Freshfield*, who had died, gave a similar notice of their testator's assignment.

On the 12th of August, 1876, *Frederic Freshfield's* trustees paid into Court, under the *Trustee Relief Act*, the sum of £154 19*s.* in respect of *Allen Freshfield's* share under his uncle's will.

The question was whether *Hulm*, as purchaser for value without notice of the prior assignment, was, by virtue of his own assignment and of his notice to *Frederic Freshfield's* trustees, entitled to *Allen Freshfield's* interest in priority to *P. W. Freshfield's* executors.

The question was raised by a summons taken out by *P. W. Freshfield's* executors for payment out to them of the fund in Court.

Crossley, for the summons:—

I submit that we are prior in point of title. *Hulm*, the second assignee, took nothing whatever under his assignment, inasmuch as his assignor, the executrix, had nothing to dispose of, her testator having already parted with his interest to us. Therefore the omission on the part of the first assignee to give notice is immaterial.

There is no authority to be found as to the effect of a second assignment of an equitable interest in a *chose in action*, where the second assignment is made, not by the *cestui que trust* himself, but by his legal personal representative; but I submit that as there was no link of title here between the *cestui que trust* and his executrix, the second assignee, who could only take what the executrix had it in her power to dispose of, took nothing under his assignment.

M. R.

1879

In re FRESHFIELD'S TRUST.

Everitt, for *Hulm* :—

I submit there is no distinction in principle between the case of a second assignment by the actual owner of the property himself, and the case of a second assignment by the legal personal representative of the owner. In either case the assignment may be perfected by notice. The executor stands in no better or worse position than his testator: he finds the property ostensibly a part of the assets, and deals with it accordingly. He has himself a *primâ facie* title, if the first assignor has not taken the steps which are absolutely necessary to perfect his own title. So that if a second assignee, purchasing from the executor without notice of the prior assignment, completes his own title by notice, he is entitled to priority.

Although there is no authority precisely in point, I submit the case is governed by the principle in *Dearle* v. *Hall* (1), *In re Barr's Trusts* (2), and the other authorities referred to in *White* and *Tudor's* Leading Cases (3).

Crossley, in reply.

JESSEL, M.R. :—

It is singular that this point does not appear to have been decided; at all events no direct authority upon it has been cited. I must therefore decide it on principle.

First, then, I must see what the principle is. Now we have authorities laying down the principle, for there can be no doubt it was settled by Sir *Thomas Plumer*, M.R., in *Dearle* v. *Hall*. What he says is this (4): "Wherever it is intended to complete the transfer of a *chose in action*, there is a mode of dealing with it which a Court of Equity considers tantamount to possession, namely, notice given to the legal depository of the fund. Where a contract, respecting property in the hands of other persons, who have a legal right to the possession is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be

(1) 3 Russ. 1.
(2) 4 K. & J. 219.
(3) 5th Ed. vol. ii. pp. 779 *et seq.*
(4) 3 Russ. 12.

laid hold of—that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken there is neglect; and it is fit that it should be understood, that the solicitor, who conducts the business for the party advancing the money, is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having been made in the equitable rights affecting it: he considers himself to be a trustee for the same individual as before, and no other person is known to him as his *cestui que trust*. The original *cestui que trust*, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever; so that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those, who may chance to deal with him, protect themselves from his fraud? Whatever diligence may be used by a *puisne* incumbrancer or purchaser—whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right,—the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees; and they must be considered as foreseen by those who, in transactions of that kind, omit to give notice; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty: and whenever persons, treating for a *chose in action*, do not give notice to the trustee or

M. R. 1879 *In re* FRESHFIELD'S TRUST.

executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence."

The same point came before Lord *Lyndhurst* in *Loveridge* v. *Cooper* (1), where he says (2): "In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking possession of the fund: it is going as far towards equitable possession as it is possible to go, for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls."

So much for the principle.

Now the case before me is the case of a man mortgaging his equitable interest under a will. No notice of the assignment is given by the mortgagee to the trustees of the will. The mortgagor dies, having made a will. His executrix sells the same equitable interest to a purchaser for value without notice. It is said that the executrix of the mortgagor took nothing under his will, and therefore had nothing to assign; but that is the case with every assignor who makes a second assignment of his equitable interest to an innocent purchaser, and yet that does not prevent the legal holders of the fund from being trustees, as was said in *Dearle* v. *Hall* (3), for the second purchaser if he takes the precaution of giving notice of his assignment.

Therefore, the foundation of the principle laid down in *Dearle* v. *Hall* does not depend upon the question whether the assignor is the actual owner of the property or whether he is merely the representative of the owner, but, as Sir *Thomas Plumer* points out, upon the fact of the person who has the power of disposition over the equitable interest taking the same security repeatedly into the market, and inducing third persons to buy under the erroneous belief that he is entitled to the property absolutely.

Now, I am of opinion the same mischief happens whether the owner of the property himself assigns, or whether his legal per-

(1) 3 Russ. 1, 30. (2) 3 Russ. 58.

(3) 3 Russ. 1.

sonal representative assigns: there can be no difference in principle when you come to examine it. In the one case the owner of the property sells it to a second purchaser without notice; the purchaser comes to the trustees and says, Have you notice of any assignment? They say no. Thereupon the second purchaser takes his assignment, and, having given notice of it, ranks before the first purchaser.

In the other case, the owner of the property having sold it, dies: his legal personal representative sells it to a second purchaser, sells it, that is, as part of the assets: this purchaser comes to the trustees and says, Have you notice? They say no. Thereupon the second purchaser takes an assignment and gives notice. Why should the fact of the second assignment being by the legal personal representative make any difference? Is it not exactly what Sir *Thomas Plumer* says in *Dearle* v. *Hall* (1), that is, does not the first purchaser, through his omission to give notice, allow the legal personal representative to "appear to the world to be the complete equitable owner;" and is not the first purchaser to "become responsible for the easily foreseen consequences of his own negligence?"

I am clearly of opinion that the principle in *Dearle* v. *Hall* applies to the present case, and consequently that the second assignee has the better title, and is therefore entitled to have the fund paid out to him.

Solicitors: *Batty & Whitehouse; H. W. Christmas.*

(1) 3 Russ. 1.

M. R. 1879 March 14.

LONDON AND COUNTY BANKING COMPANY *v.* DOVER.

[1879 L. 2.]

Mortgage—Foreclosure—Interlocutory Application for Sale—Chancery Procedure Act, 1852 (15 & 16 *Vict. c.* 86), *s.* 55.

The 55th section of the *Chancery Procedure Act*, 1852, does not authorize the Court in an ordinary foreclosure action to direct a sale on an interlocutory application.

Davis v. *Ashwin* (1) questioned.

THE Plaintiffs were equitable mortgagees of a messuage and hereditaments, and brought their action for foreclosure or sale, the principal money and a year's interest being due on the security.

Andrew Thomson, on behalf of the Plaintiffs, now moved for an immediate sale of the property under sect. 55 of the *Chancery Procedure Act*, 1852 (2). He referred to *Davis* v. *Ashwin* (1), where debenture holders who had a charge upon the real estate of a company brought an action to realize their security, and upon an interlocutory application under the same section Vice-Chancellor *Hall* made an order for an immediate sale.

The Defendants were served but did not appear.

JESSEL, M.R., considered that sect. 55 of the *Chancery Procedure Act*, 1852, did not apply to an ordinary foreclosure suit, and did not authorize an order for sale of mortgaged property in such a suit on an interlocutory application. The section referred to the sale of real estate "for the purposes of the suit," shewing that it was intended to apply to administration suits. Besides, the 48th section, under which the Court could direct a sale of mortgaged

(1) 47 L. J. (Ch.) 70; 26 W. R. 139.

(2) "If after a suit shall have been instituted in the said Court in relation to any real estate, it shall appear to the Court that it will be necessary or expedient that the said real estate or any part thereof should be sold for the purposes of such suit, it shall be lawful for the said Court to direct the same to be sold at any time after the institution thereof."

property instead of a foreclosure, did not authorize the Court to order a sale on an interlocutory application.

His Lordship declined to follow *Davis* v. *Ashwin* (1), unless it was distinguishable from the present case. The motion must be refused.

M. R.
1879
LONDON AND COUNTY BANKING COMPANY. v. DOVER.

Solicitors: *Silvester & Co.*

YORK UNION BANKING COMPANY *v.* ARTLEY.

M. R.
1879
March 29.

[1879 Y. 2.]

Equitable Mortgagee—Right to either Sale or Foreclosure—Chancery Procedure Act, 1852 (15 & 16 *Vict. c.* 86), *s.* 48.

An equitable mortgagee by deposit of deeds accompanied by an agreement to execute a legal mortgage, is entitled to either sale or foreclosure.

THE Plaintiffs made advances to one *Amos Artley* on the security of his promissory note and a deposit of title deeds relating to certain real estate; the deposit being accompanied by a memorandum by which *Artley* agreed to "execute a good and effectual mortgage" of the property to the Plaintiffs when required.

Artley died indebted to the Plaintiffs, having by his will given all his property to his wife and children.

This was an action by the Plaintiffs against the testator's widow and only child, an infant, claiming foreclosure or sale.

The action now came on as a short cause upon motion for judgment, the minutes proposing a sale instead of foreclosure.

Maclean, for the Plaintiffs:—

In *James* v. *James* (2) it was held that the relief to which an equitable mortgagee by deposit was entitled was foreclosure, and not a sale under sect. 48 of the *Chancery Procedure Act*, 1852 (15 & 16 Vict. 86); but from the more recent authorities it would seem that he is entitled to a sale also, where there has been an agreement to execute a legal mortgage: *Seton* on Decrees (3).

(1) 47 L. J. (Ch.) 70; 26 W. R. 139, W N (1877) 248.
(2) Law Rep. 16 Eq. 153.
(3) 4th Ed. p. 1133.

M. R.

1879

YORK UNION BANKING COMPANY v. ARTLEY.

Macalpin, for the Defendants.

JESSEL, M.R.:—

It appears to me that the equitable mortgagee is entitled to either sale or foreclosure. You may, therefore, take an order for sale under the 48th section of the Act.

Solicitor: *W. Stubbs*, agent for *T. Harland, Bridlington.*

M. R.

1879

March 15.

HARRISON *v.* WEARING.

[1876 H. 488.]

Practice—Costs—Taxation—Counsel's Fees—Refreshers.

5 P.D. 120
16 Ch.D. 728 & 729

In taxing the costs of an action in the Chancery Division tried on oral evidence, the Taxing Master should follow the rule in the Common Law Divisions of allowing refreshers to counsel for every day occupied by a trial beyond one day's time; but where the action is tried on affidavit evidence no refreshers should be allowed.

The amount of the refreshers lies in the discretion of the Taxing Master, and depends on the fee originally marked on the brief and the nature of the case.

The rule in *Smith* v. *Buller* (1), that the criterion for allowing refreshers is the length of time occupied by the trial, irrespective of the mode in which the evidence has been taken, dissented from.

THIS was a summons by the Plaintiff to review the taxation of the costs of the action under the following circumstances:—

The action was for the rectification of a lease and for specific performance of an agreement for sale contained therein, and on the 3rd of May, 1878, the Plaintiff obtained judgment with costs.

The trial took place on *vivâ voce* evidence and occupied half of one day and the whole of the next, when it was concluded. The Plaintiff having carried in his bill of costs for taxation, a charge for refreshers to his counsel for the second day of the trial was disallowed. This disallowance the Plaintiff objected to, alleging the following reasons for his objection: 1. Because it is the practice in the Taxing Office when a cause with witnesses has

(1) Law Rep. 19 Eq. 473.

been opened, and witnesses or a witness have or has been examined on the first day and the hearing goes over to the second day, and further witnesses are to be and are examined on that day, to allow a refresher to counsel. In this case the examination-in-chief, cross-examination, and re-examination of the Plaintiff took place on the first day, and ten witnesses were examined on behalf of the Plaintiff, and the Defendant and one witness on behalf of the Defendant were examined on the second day. 2. That it is the practice in similar cases when witnesses have been examined to allow a second consultation with counsel.

In reply to these objections, the Taxing Master stated that "the true criterion as to the allowance of refreshers was the length of time occupied by the case. When the hearing extended over two days refreshers should be allowed whether evidence was adduced by affidavit or *vivâ voce*. The present case was concluded on the second day, and he considered the original fees marked on the briefs of the Plaintiff's counsel sufficient to cover both days;" and he accordingly adhered to his former decision.

The Plaintiff now applied that his objections to the taxation might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly.

It appeared from a written opinion given by Master *Hodgson* in 1866, in reply to an inquiry made by Master *Follett* when taxing the costs in *Bovill* v. *Smith*, a patent suit in the Court of Chancery, that it has been the practice for many years in the Court of Queen's Bench to allow daily refreshers to counsel on trials which last more than one day, provided the trial is one which necessarily occupies more than one day; for instance, no refresher is allowed where the trial runs into a second day merely because it began late on the first day; also that in fixing the amount of the refresher regard is to be had to the amount of the original fee, to the nature of the action, and to the duration of the trial; and that the Masters may disallow refreshers altogether.

It was stated at the Bar that five out of the seven Chancery Taxing Masters are in favour of daily refreshers in witness causes in the Chancery Division.

Caldecott, for the summons:—

I submit that under the new practice of trying actions in the

M. R. 1879 HARRISON v. WEARING.

Chancery Division on oral evidence the Common Law rule of allowing refreshers for every day the trial lasts after the first clear day, should prevail. The Taxing Master's reasons for disallowing refreshers in the present instance are taken from the judgment of Vice-Chancellor *Malins* in *Smith* v. *Buller* (1), a case under the old practice, where his Lordship held that the brief fee might be taken to cover two days, but that otherwise the common rule as to refreshers applied to suits in Chancery whether on written or oral evidence. I submit, however, that now the rule in the Chancery Division should be the same in all respects as in the Common Law Divisions.

In *Hill* v. *Hibbit* (2) Vice-Chancellor *Bacon* followed the Common Law rule of allowing refreshers for every day after the first; and five out of the seven Chancery Taxing Masters are in favour of that view.

F. H. Colt, for the Defendant:—

I submit that it is a matter entirely for the discretion of the Taxing Master as to whether refreshers should be allowed or not. Here he has exercised his discretion and considered that the brief fee was sufficient to cover both days. The Court should not interfere with the exercise of that discretion.

JESSEL, M.R.:—

It is plain, in my opinion, that the Taxing Master has come to the conclusion he has in this case because he thought himself bound by a practice which it appears to me is not the right practice. The reason he gives for his conclusion is really taken from a judgment of Vice-Chancellor *Malins* in the case of *Smith* v. *Buller* (3). There the Vice-Chancellor says this: "I have been informed by Mr. *Follett* that it is the custom in the Taxing Master's office to allow refreshers only in cases in which witnesses are examined *vivâ voce* in Court, when it is supposed that the case is specially assimilated to a common law trial at *nisi prius*. Now from that view I entirely dissent, since it is evident that there may be quite as much difficulty in a case where evidence is adduced by

(1) Law Rep. 19 Eq. 473. (2) Law Rep. 14 Eq. 221.
(3) Law Rep. 19 Eq. 473, 484.

affidavit as by examination *vivâ voce*. The true criterion is the length of time occupied, not how it is occupied; and my opinion is, that where the hearing of a case extends over more than two days the Court ought to allow refreshers for the extra time occupied, and that this rule should apply quite as much when the evidence is read as when it is taken *vivâ voce*. In other words, the rule should be fixed on the ground of the time occupied, and not on that of the mode in which the evidence is taken."

If that is the right rule, it will apply where a long argument takes over two days. You may have an argument on a point of law extending over several days, as has often happened, but I have never heard of anybody suggesting that refreshers could be allowed in such a case. Therefore, with the greatest possible respect to the learned Vice-Chancellor, the rule is not, in my opinion, as he has stated it to be.

Then, what is the rule? First of all, let us consider what the rule is at common law. The Court of Queen's Bench and the Court of Exchequer had a rule which is perfectly intelligible. The rule was, that where the case occupied more than one day—that means more than one day's time, not more than one actual day, for it might occupy portions of two days, but the two portions together might not make a whole day—where the case, I say, occupied more than one day's time refreshers might be allowed.

That was the rule, and a very simple rule indeed. Of course the Master had a discretion to refuse refreshers on special grounds, and he determined the amount of refresher by reference to the magnitude of the case and the nature of it. That rule is well stated by Master *Hodgson*, in answer to an inquiry which Master *Follett* made in 1866 in reference to the case of *Bovill* v. *Smith*. The rule was not the same in the Court of Common Pleas, where they did not allow refreshers at all. The fact is, the practice in the Court of Common Pleas was very exceptional for a great number of years, until the year 1834, when the Serjeants lost the right of exclusive audience there, and a totally different practice prevailed in that Court from the practice which prevailed in other Courts. But in the year 1874, as will be found on referring to a case in the Common Pleas of *Laurie* v. *Wilson* (1), the Court of

(1) Law Rep. 10 C. P. 152.

M. R. 1879 HARRISON v. WEARING.

Common Pleas decided that they would follow the same practice as the Court of Queen's Bench and the Court of Exchequer, and that for the future the general practice should be the same in all the Courts; and they there stated that the Master would have a discretion in that particular case, as in all other cases, to disallow the refreshers altogether on special grounds.

From 1874 that has been the practice of the Common Law Courts, and, of course, after the *Judicature Act* came into operation, of the Common Law Divisions; but in equity it was different, the mode of taking evidence in Equity being, until a comparatively recent period, altogether different. Now the reason, as I understand it, for allowing refreshers is this—I say "as I understand it," for I do not find that anybody has stated it—when the solicitor delivered his brief, and the evidence was all written, as it was in Chancery, he could guess how long the case would last, and could guess what was the proper fee to pay the counsel engaged in the case. The solicitor knew all the evidence, and the size of the brief, as a brief, would tell him what to pay; and the mere accident of the case going off a little earlier by some objection prevailing in the case, or its lasting a little longer, made no difference —the thing averaged itself, and therefore the fee was settled once for all; and that applied whenever the evidence was taken by affidavit without cross-examination. That is exactly on the same principle as when evidence was taken by written depositions in the old Chancery practice.

Therefore, it seems to me that whenever the evidence is all written, and no oral evidence is taken, the old rule applies, and no refreshers should be given. If the rule depended on the length of time only, you would have refreshers upon the argument of a demurrer, or of any other point of law; but, according to my understanding, no refreshers should be allowed in that case.

The length of time the argument extends is not the criterion for fixing the fee which is to be paid, because one counsel may be be very long on a very small point of law indeed, and another counsel may be very short on a very long point of law indeed; therefore that is not the test. If it were it would come to this: the suitor would pay more if it happened that the counsel engaged was a very bad counsel who wasted a great deal of time in

unnecessary and irrelevant argument than if he was able to say in a small compass all that was necessary to be said. It is seen every day that one counsel will put his arguments in a much shorter form than another, and will yet say all that is requisite. It would, in fact, be holding out a premium for long and unnecessary arguments. Therefore length of time alone is not the test. The real reason which has guided the practice as to refreshers is this: when the witnesses are examined or cross-examined orally the solicitor on one side does not know how many witnesses will be called on the other. He knows his own proofs, but he does not know his opponent's proofs; and, consequently, if he has six witnesses, and makes a very small brief, and his opponent has thirty-six witnesses, and makes a very long brief, it is quite obvious that the fees for the Plaintiff and the fees for the Defendant would be very different indeed if they depended merely on the size of the brief; but if the time be taken into consideration it affords a measure, if I may say so, of the scale of fee similar to the number of pages in the case of written evidence: that is to say, the oral evidence is measured, not by pages but by time, and in that way you find a means of regulating the fee after the case is over. That appears to me to be a fair explanation of the practice.

Then it has to be considered how long the time should be before making a new start, and the Taxing Masters at Common Law have decided that a day's time is sufficient; and I think that is reasonable. The same practice therefore ought to apply in this Division as in all the other Divisions of the High Court. Whatever the practice is it should be the same for the same matters, and I can see no reason for any difference.

It appears to me that the authorites, when you come to look at them, are rather in favour of that view. When patent cases came to be tried in Courts of Equity and issues were settled, they were always taxed in that way with refreshers. Then there came cases upon which a question arose whether it was proper that refreshers should be allowed, and I see that in one case to which I have been referred, before Vice-Chancellor *Bacon*, where witnesses were examined *vivâ voce*, he considered that refreshers ought to be allowed just as in a case tried at *Nisi Prius*.

M. R.
1879
HARRISON
v.
WEARING.

Then I come to another set of cases in which the Taxing Masters, as I am told, in the proportion of five out of seven, have always allowed refreshers; that is in cases equivalent to trials at *Nisi Prius* with oral evidence, and a very large number of those cases are now tried in the Chancery Division. It seems to me that is the right practice and that the rule should be the same here, namely, that where the case goes over one day refreshers should be allowed for every day afterwards.

That being so, this case must go back to the Master, because, as I understand, it lasted over one day, and certainly took more than one day's time; consequently it was proper that the Plaintiff's counsel should be entitled to refreshers; and as the case is going back to the Taxing Master I have no hesitation in saying that it was a case of considerable magnitude, importance, and difficulty, and therefore afforded a very good reason for giving counsel refreshers. The only other element to be considered is the amount of refresher. That amount appears by the Common Law practice to depend on the fee originally marked on the brief and the nature of the case. That question will be decided by the Taxing Master.

As regards the costs, I do not see why Mr. *Colt's* client should pay the costs of settling the practice, and I therefore make no order as to costs.

Solicitors: *Shum, Crossman, & Co.; E. Warriner*, agent for *R. B. Cragg, Skipton.*

BURNELL *v.* BURNELL.

M. R.
1879
March 21.

[1878 B. 619.]

Partition Action—Motion on Admissions in Pleadings—Order for Sale—Rules of Court, 1875, *Order* XL., *r.* 11.

An order for sale may be made in a partition action on a motion upon admissions in the pleadings under Rules of Court, 1875, Order XL., rule 11. In such an order the Court will direct an account of rents and profits received by the Plaintiff, where he has been in possession, and adjourn further consideration.

THIS was an action for the partition of certain freehold, copyhold, and leasehold estates belonging to the Plaintiff and Defendant as tenants in common in equal shares.

The Defendant by his statement of defence admitted the Plaintiff's title as set out in the statement of claim, but desired a sale instead of a partition. He also alleged that the Plaintiff had been in possession of the entire property for some years, and accordingly claimed an account of rents and profits.

The Plaintiff now moved, under Rules of Court, 1875, Order XL., rule 11, for an order, based upon the admissions in the statement of defence, for a sale instead of a partition, and that the proceeds of sale might be paid into Court to the credit of the action, and that the further consideration of the action might be adjourned.

Roxburgh, Q.C., and *Yate Lee*, for the Plaintiff:—

We submit we are entitled to proceed on motion upon admissions in the pleadings under Order XL., rule 11, a cheaper and more expeditious course than bringing on the action upon motion for judgment in the ordinary way. In *Gilbert* v. *Smith* (1) the inquiries necessary in a partition action were directed upon a motion on admissions, and there seems to be no reason why a sale should not be ordered upon a similar application.

Davey, Q.C., and *Speed*, for the Defendant, consented to the order being made, provided his Lordship considered he had juris-

(1) 2 Ch. D. 686.

M. R. 1879 BURNELL v. BURNELL.

diction to make it; but they desired complete judgment, and an account of the rents and profits received by the Plaintiff, with further consideration adjourned, which could be done on motion as in *Bennett* v. *Moore* (1).

JESSEL, M.R.:—

I am of opinion that the Court has jurisdiction under Order XL., rule 11, to make the order now asked for, and thus save delay and expense to the parties.

There will therefore be an immediate order for sale, as on a motion for judgment, the Defendant requesting a sale; and for payment of the proceeds into Court. The order will also direct an account of rents and profits received by the Plaintiff for six years prior to the issue of the writ, and adjourn further consideration.

Solicitors: *T. H. Devonshire; Taylor, Hoare, & Co.*

M. R. 1879 March 21.

WOODARD *v.* BILLERICAY HIGHWAY BOARD.

[1879 W. 125.]

Trees overhanging Highway—Order of Justices on Occupier of Adjacent Lands —Owner or Occupier—Highways Act (5 & 6 *Will.* 4, *c.* 50), *s.* 65.

The word "owner" in sect. 65 of the *Highways Act* (5 & 6 Will. 4, c. 50) means the person in actual occupation.

An order of justices under sect. 65 for lopping trees overhanging a highway made on a summons served only on the occupying tenant of the land abutting on the highway:—

Held to be valid, and in form sufficient.

THIS was a motion on behalf of the Plaintiff, *Thomas Frederick Woodard*, to restrain the Defendants, the *Billericay* Highway Board, their servants, surveyors, agents, and workmen, from proceeding to prune, or lop, or cut, or in any other way interfere with, any trees growing in or near the hedges or other fences of the lands of the Plaintiff, in the occupation of *Edward Woodard*, abutting upon the carriage or cartway leading from the town of

(1) 1 Ch. D. 692.

Billericay to *Laindor Common*, in the parish of *Great Burstead*, *Essex*.

The Plaintiff was the owner of several inclosures of meadow land in the parish of *Great Burstead*, with a frontage on the said highway.

The tenant of the land was *Edward Woodard*, who held the land upon a yearly tenancy.

On the 24th of February, 1879, a summons under the *Highway Act* (5 & 6 Will. 4, c. 50), s. 65 (1) was served on the said *Edward*

(1) Sect. 65 enacts: "That if the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament or for shelter to any hop-ground, house, building, or court-yard, or the owner thereof), growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway, to the damage thereof, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are growing next adjoining to such carriageway or cartway to appear before the justices at a special sessions for the highways to shew cause why the said hedges are not cut, pruned, or plashed, or such trees not pruned or lopped, in such manner that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof, or why the obstruction caused in such carriageway or cartway should not be removed; and the question as to the cutting, pruning, or plashing such hedges, or the pruning and lopping such trees, or the removal of such obstruction as aforesaid, shall, upon proof of the service of such summons, and whether the said owner attend or not, be determined at the discretion of such last-mentioned justices; and if such justices shall order and direct that such hedges shall be cut, pruned, or plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left at the usual place of abode of the said owner, or of his steward or agent, and in default thereof shall forfeit on conviction a sum not exceeding forty shillings; and the said surveyor, if the order of the said justices is not complied with, shall, and he is hereby authorized and required to cut, prune, or plash such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this Act; and the said surveyor shall be reimbursed by the owner as aforesaid what charges and expenses he shall be at in cutting, pruning, and plashing such hedges, and pruning and lopping such trees, and the removal of such obstruction, over and above the said forfeiture; and it shall and may be lawful for the justices at a special sessions for the highways, upon proof to them made upon oath, to levy as well the expenses

M. R. 1879 — WOODARD v. BILLERICAY HIGHWAY BOARD.

Woodard, the tenant of the land, to appear before the justices of the peace for the county at *Brentwood* on the 27th of February, to shew cause why the obstruction to the carriage or cartway alleged to be caused by certain trees being allowed to grow on land of the said *Edward Woodard*, and to overhang the said carriage or cartway, should not be removed by the said trees being pruned or lopped.

The said *Edward Woodard* was unable to attend, but at the special sessions for the highways held at *Brentwood* on the 27th February, 1879, an order was made by the Defendants, the *Billericay* Highway Board, whereby, after stating the complaint as to the obstruction caused to the carriage or cartway by reason of certain trees being allowed to grow on land of the said *Edward Woodard*, and to overhang the carriage or cartway, and that the said *Edward Woodard* had made default in appearing, and that the offence had been proved, it was ordered as follows: "That all such trees as grow in or near the hedges or other fences of the lands of the said *Edward Woodard* abutting upon the said carriage or cartway be pruned or lopped, so that the obstruction caused to the said carriage or cartway there shall be removed; and, in case the said *Edward Woodard* should not comply with this order within ten days after service, that the surveyor do prune and lop such trees" in manner directed by the order.

The Plaintiff, who had not been served either with the summons or order, now moved for an injunction to restrain the Defendants, as before mentioned.

Chitty, Q.C., and *Nalder*, for the Plaintiffs:—

The order of the highway board was bad, as the summons ought properly to have been served on the Plaintiff as the owner of the land, and not on the occupier. The word "owner" in sect. 65 of the *Highways Act* cannot be understood to mean the occupying tenant, who may be a tenant from year to year, and who can have

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of cutting, pruning, and plashing such hedges, or pruning and lopping such trees, or removal of such obstructions as aforesaid, as the several and respective penalties hereby imposed, by distress and sale of the offenders' goods and chattels, in such manner as distresses and sales for forfeitures are authorized and directed to be levied by virtue of this Act."

no right to cut the trees on the property of his landlord. The effect of the Defendants' construction of the section would be to give a right to the tenant as against the owner of the inheritance. Moreover, assuming that such an order could be properly made on the occupying tenant, the order in question was bad on the face of it, because it did not set forth what particular trees were to be cut, nor to what height, nor did it shew that the trees were not planted for ornament or shelter.

In *Brook* v. *Jenney* (1), an order for cutting certain hedges, under sect. 65 of the Act, was held to be bad, for not specifying more particularly in what manner and to what extent the owner on whom such order was served was to cut the hedges, and it was held that this was a substantial defect, and not merely one of form.

C. H. Turner, for the Defendants, was not called on.

JESSEL, M.R.:—

In my opinion what has been done in this case has been rightly done. The real question is as to the meaning of the word "owner" in sect. 65 of the *Highways Act* (5 & 6 Will. 4, c. 50).

Now it is to be observed that sect. 65 is not in terms a penal section in the same manner as sect. 64. In that section the penalty is on the "owner or occupier," and the section no doubt authorizes the occupier to cut down the trees there referred to. Then, if you look at sect. 65 it provides that where an order is made, the "owner" is the person directed to comply with it, pointing to the same person.

By sect. 5, which is the interpretation clause, it is directed that "owner shall be understood to include occupier," shewing that the word means occupier when the person in occupation is not the full owner.

Any other construction of the word "owner" in the 65th section would lead to great difficulty. In the first place he is to be summoned to appear before the justices. How is an owner to be summoned if he lives at a distance? He may be in *Scotland* or *Ireland,* for many owners do not reside on their estates, and it is

(1) 2 Q. B. 265.

M. R. 1879 WOODARD v. BILLERICAY HIGHWAY BOARD.

not rational to suppose that a man should be summoned if non-resident. Therefore, that part of the context shews that it means the man in occupation. It is then provided that if the justices shall order such trees to be pruned or lopped as therein directed, "the said owner shall comply therewith within ten days after a copy of such order shall have been left at the usual place of abode of the said owner, or of his steward or agent." Are they to go to a distant abode to serve the owner when the order must be complied with within ten days after service? These words also seem to shew that the "owner" is a man who lives there. Then the section goes on to provide that, if the order of the justices is not complied with, the surveyor may prune or lop the trees himself, and "be reimbursed by the owner" his charges and expenses, and that it shall be lawful for the justices to "levy the expenses of pruning and lopping such trees . . . as the several penalties hereby imposed by distress or sale of the offender's goods and chattels in such manner as distresses and sales for forfeiture are authorized and directed to be levied by virtue of this Act." Then there is a penalty imposed, and how is it to be enforced? Whose are the goods and chattels? Obviously they must belong to a person who is on the spot. If the owner is in *London*, could it be said that they were bound to go to *London* to enforce this distress? I think not, and therefore, looking at the whole section, I am clearly of opinion that the term "owner" means the man in occupation, who may be either actual owner or else only the occupying tenant.

The opposite view would lead to insuperable difficulty. Take for instance the case of an estate in settlement where there is a tenant for life impeachable for waste, with remainder to infants, or other persons. If the Plaintiff's construction were adopted it would be necessary to serve all the persons entitled, many of whom could not be reached. Every man in occupation of land has a kind of limited ownership, and therefore, on a fair reading of the section, the word "owner" must mean owner or occupier.

The other objection taken by the Plaintiff related to the form of the order. The order stated that an obstruction was caused by reason of certain trees being allowed to grow on land of *Edward Woodard*, so as to overhang the carriage or cartway, and directed

as follows: "That all such trees as grow in or near the hedges or other fences of the lands of the said *Edward Woodard*, abutting upon the carriage or cartway, shall be pruned or lopped so that the obstruction caused to the said carriage or cartway shall be removed." It seems to me that as the trees are there described as overhanging the road, that description is not at all ambiguous, and is quite sufficient to indicate what trees are meant and are required to be pruned or lopped.

The motion, therefore, fails on both grounds, and must be refused with costs.

Solicitors: *T. F. Woodard*; *Lewis & Indermaur*, agents for *Lewis & Son, Brentwood.*

V.-C. B.
1879
Feb. 12.

LEVY *v.* LOVELL.

[1878 L. 113.]

Foreign Attachment—Lord Mayor's Court—Liquidation—Creditor "holding Security"—Bankruptcy Act, 1869, *s.* 12.

14 Ch D 45.

A creditor who has served a writ of foreign attachment in an action in the Court of the Lord Mayor of *London* is a "creditor holding security upon the property of the debtor" within the meaning of sect. 12 of the *Bankruptcy Act*, 1869, although the presentation of a liquidation petition by the debtor, followed by an interpleader order, has prevented the creditor from proceeding to judgment in the action.

Affd on appl 14 Ch D. 234.

QUESTION of law for trial.

On the 15th of October, 1875, *Henry Levy*, of 43, *High Street*, *Islington*, tailor and outfitter, effected a policy of fire insurance with the *Phœnix Insurance Company*.

On the 4th of December, 1876, *H. Levy* died, having by will, dated the 2nd of November, 1876, bequeathed the residue of his real and personal estate to his wife, *Elizabeth Levy*, absolutely, and having appointed her his sole executrix, by whom the will was, on the 19th of December, 1876, duly proved. The testator's business was continued at No. 58 (late 43), *High Street, Islington*, by Mrs. *Levy* in partnership with one *Henry Marcus*, under the firm of *Marcus & Co.*, and Mrs. *Levy* continued to pay the premiums on the policy.

By a writ of summons dated the 17th of January, 1878, an action was commenced in the Exchequer Division against Mrs. *Levy* by *Isaac Genese* and *Nathan Edwards*, claiming £40 8*s.* for the price of goods sold and delivered to the late *Henry Levy;* and on the 21st of January the writ was served on Mrs. *Levy*.

On the 23rd of January, 1878, a fire occurred on the insured premises.

On the 5th of February, 1878, *George William Lovell* and *John Josiah Broomfield*, in their capacity of secretaries of the *Phœnix Company*, were served with an attachment in an action entered in the Lord Mayor's Court at the suit of *Genese* and *Edwards* against Mrs. *Levy* in her own right in a plea of debt upon demand of

£40 8*s.* 5*d.*; and on the same day the same persons were served with another attachment in another action entered in the same Court at the suit of the same Plaintiffs against Mrs. *Levy* as executrix *de son tort* in a plea of debt upon demand of £28 3*s.* 5*d.*

The language of these attachments, which was in common form, was as follows:—

"I do attach all such moneys, goods, and effects as you now have, or which hereafter shall come into your hands or custody, of the said Defendant to answer the said Plaintiff in the plea aforesaid; and that you are not to part with such moneys, goods, or effects without license of the said Court."

On the 11th of February, 1878, judgment was recovered against Mrs. *Levy* by *Genese* and *Edwards* in the action in the Exchequer for £40 8*s.* debt and £3 14*s.* costs.

On the same day the *Phœnix Company* duly appeared to the two actions in the Lord Mayor's Court.

By a writ of summons dated the 13th of February, an action was commenced in the Exchequer Division against Mrs. *Levy* as executrix *de son tort* by *Genese* and *Edwards*, claiming a balance of £28 4*s.* 5*d.* for goods sold and delivered.

On the 15th of February the amount of loss by the fire was agreed upon at the sum of £330.

On the 22nd of February a summons was taken out in the matter of the estate of *Henry Levy*, deceased, in an action by *Ellis Berg*, on behalf of himself and all other creditors of *Henry Levy*, deceased, against Mrs. *Levy*, for the administration of the personal estate of the testator, *Henry Levy*.

On the 25th of February Mrs. *Levy* filed a liquidation petition.

On the 4th of March the usual administration order was made, and *John Ball Ball* was appointed receiver, who, on the 9th of March applied to the accountant of the *Phœnix* office to know what was then the position of the claim upon the office under the policy.

On the 13th of April the present action was commenced by writ of summons by Mrs. *Levy*, suing as executrix, against *Lovell* and *Broomfield*, indorsed with a claim for £330, the amount of the policy moneys.

V.-C. B. 1879 LEVY v. LOVELL.

On the 15th of April a liquidation resolution was passed, and *Isaac Lord* was appointed trustee; and he on the following day applied to the company to hand over the moneys to him.

On the 2nd of May an interpleader summons in *Levy* v. *Lovell* was taken out by the Defendants *Lovell* and *Broomfield*, supported by the usual affidavit made by a clerk of their solicitors.

On the 14th of May an order was made at Chambers in this branch of the Court on the interpleader summons, on the application of the Defendants, and upon hearing the solicitors for the applicants, for the Plaintiffs, and for *Genese* and *Edwards*, and several other claimants, whereby it was ordered that certain claimants should stand debarred of any further claim or interest in the subject-matter of the action; that the Defendants should on or before the 1st of July pay into Court to the credit of *Levy* v. *Lovell* the sum of £302 19*s.* 2*d.*, being £330, less £27 0*s.* 10*d.*, their ascertained costs of the application; that upon such payment all further proceedings in *Levy* v. *Lovell* as against the Defendants, except such as might be necessary for enforcing the present order should be stayed; that the Plaintiff, *Ball*, *Lord*, *Genese* and *Edwards*, and all the other claimants, should be restrained from commencing proceedings against the company; and that the following question between *Genese* and *Edwards* and *Lord* be tried before the Court without a jury, that was to say, whether *Genese* and *Edwards* "have any and what charge, lien, or security under the *Bankruptcy Act*, 1869, by reason of the attachments issued by them upon the fund."

The sum of £302 19*s.* 2*d.* was accordingly paid into Court by the *Phœnix Company;* and the above question now came on for trial.

De Gex, Q.C., *Romer*, and *Phipson*, for the applicants, *Genese* and *Edwards*:—

The question between us and the liquidation trustee is this: He says we are not secured creditors; we, on the other hand, say that our debt was a secured debt, and hence protected by the 12th section of the *Bankruptcy Act*, 1869.

That an attachment under the *Common Law Procedure Act*, 1854, being a seizure by way of execution for a debt due from

a specific person named in the garnishee order, is a secured debt, appears from *Emanuel* v. *Bridger* (1). And in *Lowe* v. *Blakemore* (2) it was held that a judgment creditor who had obtained and served on the garnishee an order *nisi* under the *Common Law Procedure Act*, 1854, was within the protection of the 12th section; disapproving in this respect a decision in this branch of the Court of *Ex parte Greenway* (3); and the two former decisions, as against the latter, have been supported in *Ex parte Joselyne* (4).

But it is said that the circumstance of this being a foreign attachment makes a difference. In answer to that we have the authority of Vice-Chancellor *Hall*, who, in *In re London Cotton Mills Company* (5), held that the issue of a writ of attachment out of the Lord Mayor's Court against the garnishee company on the 13th of January, the liquidation petition not having been presented until the 1st of February, and judgment against the company not having been signed till the 9th, was sufficient to protect the creditor. The Vice-Chancellor said, "The attachment might have had something inchoate in its nature at first, but having been ripened by judgment into a complete attachment it must prevail over the liquidation. It was true that the liquidation proceedings related back to the filing of the petition, but they could not affect the security obtained by the creditor by virtue of his writ of attachment, for that writ placed the money in the custody of the law; and the case seemed to him to be clearly within the 12th section of the *Bankruptcy Act*, 1869."

With respect to the larger debt, that of £40 8*s.*, we have actually recovered judgment for it against Mrs. *Levy* in the Exchequer action.

Mrs. *Levy* herself paid the premiums, hence the policy moneys would be recoverable by her in her own right, and not in her character of executrix.

In *Ex parte Banner* (6) it was held that an order for reference obtained on the application of the Defendant debtors was sufficient security to give the Plaintiff creditor the benefit of the 12th section; because the property was considered as being lodged in Court.

(1) Law Rep. 9 Q. B. 286.
(2) Ibid. 10 Q. B. 485.
(3) Ibid. 16 Eq. 619.
(4) 8 Ch. D. 327.
(5) 25 W. R. 109. W.N.(1876) 208
(6) Law Rep. 9 Ch. 379.

V.-C. B. 1879 LEVY v. LOVELL.

In *Verral* v. *Robinson* (1) it was decided that the service of a writ of attachment placed the property attached *in custodiâ legis.*

Sir *H. Jackson*, Q.C., and *Laing*, for the Respondent *Lord*, the liquidation trustee:—

The all-important difference between a garnishee order under the *Common Law Procedure Act*, 1854, and an attachment, is, that the former is always preceded by a judgment, whereas the attachment issues at once. In this instance, before judgment in the Lord Mayor's Court was obtained, the liquidation resolution intervened. This makes all the difference with reference to sect. 12 of the *Bankruptcy Act*, 1869. Thus the reasoning of Vice-Chancellor *Hall* in *In re London Cotton Mills Company* (2) has no application to this case. Here the inchoate claim has never ripened into a complete attachment.

"The process of foreign attachment is not an original proceeding, but is merely ancillary to other proceedings—the essence of its principle being to place an embargo on any property of a debtor to ensure his appearance to answer the creditor's claim": *Brandon* on the Law of Foreign Attachment (3). So that the attachment must be perfected by judgment in order to give a creditor the required security within the 12th section.

The larger debt, that for £40 8*s.*, was sued for against Mrs. *Levy* in her own right. But to whom were these policy moneys due? Clearly to the husband's estate.

BACON, V.C.:—That goes to the root of your title.

Sir *H. Jackson*:—Practically we are defending the estate of Mrs. *Levy* against either claim.

The applicants, at any rate, cannot recover upon both the attachments. One of the two must be void. Taking the policy moneys as belonging to the husband's estate, the attachment in the action against Mrs. *Levy* in her own right must fail. In the action against her as executrix, the attachment must fail in either event. If the moneys are the husband's, they were not due at his death, and cannot be attached on this ground: *Williams* on Exe-

(1) 2 C. M. & R. 495. (2) 25 W. R. 109.

(3) Page 7.

cutors (1); if they are hers, they cannot be attached in an action against her as executrix.

Redhead v. *Welton* (2) shews that a creditor who, after his debtor's death, obtains a foreign attachment against part of the assets will gain no priority against the fund attached over the other creditors.

Emanuel v. *Bridger* (3) was the case of an ordinary garnishee order, and hence distinguishable on grounds already stated. The true nature of a foreign attachment is stated by *Lush*, J., in *Richter* v. *Laxton* (4), where his Lordship says: "A foreign attachment is merely process to compel an appearance. As soon as the Defendant in an action in the Mayor's Court appears, the attachment is gone. If he does not appear, the Plaintiff in the action in that Court may proceed to execution for the money attached in the hands of the garnishee; but before he can obtain this process, he must give bail to repay the amount to the Defendant in the action if the judgment should, within a given time therefrom, be given for such Defendant. Nothing short of payment by the garnishee under pressure of an execution out of the Mayor's Court will amount to a defence in any action brought against him by his creditor for the debt attached: *Magrath* v. *Hardy* (5). A garnishee order, on the other hand, is a process of execution."

Ex parte Joselyne (6) was the case of an attachment under a garnishee order under the Rules of Court of 1875. Lord Justice *James* observes,—"the moment the order of attachment is served, the property in the debt is absolutely transferred." From this the case of a foreign attachment is essentially different. In the last-mentioned case *Ex parte Greenway* (7) was disapproved; and it is commonly supposed that what was decided in *Ex parte Greenway* was, that a creditor holding a garnishee order under the *Common Law Procedure Act*, 1854, is not a secured creditor; but the head-note does not explain that what the Court decided in *Ex parte Greenway* was, that a creditor who had recovered judgment in the Tolzey Court of *Bristol*, and who, under his judgment, had

(1) 7th Ed. vol. ii. p. 2000.
(2) 29 Beav. 521.
(3) Law Rep. 9 Q. B. 286.
(4) 27 W. R. 214.
(5) 4 Bing. N. C. 782.
(6) 8 Ch. D. 327, 330.
(7) Law Rep. 16 Eq. 619.

V.-C. B. 1879 LEVY v. LOVELL.

issued out of that Court an order of attachment and garnishee summons, was not a secured creditor.

Wetter v. *Rucker* (1) shews the custom of the Lord Mayor's Court to be, that, not payment on judgment, but only payment after execution issued, will be sufficient to discharge the garnishee; in other words, the debt is not charged; and, finally, a decision of *Grove*, J., in *Barnfather* v. *Barrow* (2), is directly in favour of our contention. As to the subsequent judgment, the effect of that was to release the attachment.

In every point of view the applicants have no security; what they had was merely an inchoate right, which has never ripened into a judgment.

BACON, V.C.:—

I think the proceedings which were taken by Mr. *De Gex's* clients were all that they could possibly have taken in order that their claim might ripen into a judgment.

Service of the attachment did, in my opinion, have the effect of putting this money *in custodiâ legis*; and if the proceedings in the Lord Mayor's Court had gone on, there is no doubt the claimants would have established their title to the moneys in question.

Then it is said that these moneys formed part of the testator's estate. Who is it who says that? and what *constat* is there to enable the Court to decide that question? If, on the other hand, it is part of the estate of the widow, the liquidation debtor, then it is undoubtedly protected by the 12th section of the statute.

I have no doubt that the claimants are entitled to what they ask, and I am only sorry that the question was not decided in the County Court, or in some cheaper way than by this hearing.

The order will be that the attachment be paid out of the fund in Court, and the applicants will take their costs out of the same fund.

Solicitors for Applicants: *Bradford & Hare.*
Solicitor for Respondents: *J. Keily.*

(1) 1 Brod. & B. 491, 500.

(2) 37 L. T. (N.S.) 231.

In re SLATER'S TRUSTS.

V.-C. B.
1879
Feb. 22.

Mortgagor and Mortgagee—Reversionary Interest—Expectant Heir—Pecuniary Distress—Want of Information—Hard Bargain—Security to stand only for Sums advanced—Interest—3 & 4 Will. 4, c. 27, s. 42.

In 1858, the Petitioner, then a married woman, and her three brothers, being entitled, in reversion expectant on the death of their mother, to a sum of money charged by a settlement on land, and being in pecuniary distress, borrowed £250 on the security of their reversionary interest. By a deed dated the 22nd of December, 1858, which recited that £500 had been borrowed and advanced, it was witnessed that in consideration of £500 that day paid by *B.*, the property was granted by the four co-owners to *B.* by way of mortgage in the usual form, and a receipt for £500 was indorsed. The deed was executed and receipt signed by the four co-owners, though £250 only was advanced. On the 22nd of December, 1859, £12 10s. was paid by way of interest. In 1860 the four co-owners borrowed a further sum of £150 from *B.*, and by another deed dated in June, 1860, after reciting that although £250 only was advanced in 1858, it was then considered that the difference between £250 and £500 was a fair remuneration for the delay in payment until the death of the tenant for life, it was now witnessed that in consideration of £150 that day paid by *B.*, the four co-owners further charged the property with £300, and declared that the £300 was a reasonable and fair equivalent to *B.* for the present payment of £150, taking into consideration that *B.* paid for the security, the age and state of health of the tenant for life, that *B.* would be prevented from using the money in his business, and that the offer had been refused by other lenders. The deed then contained a covenant by *B.* not to call in the principal thereby secured during the life of the tenant for life, except only in case of non-payment of interest. Neither of the above deeds was acknowledged by the Petitioner. Both deeds were prepared for all parties by the same solicitor, to whom *B.* shortly afterwards, in consideration of £400, transferred the two debts and the securities. No interest after the 22nd of December, 1859, was ever paid.

The tenant for life having died, and the settlement trustees having paid the fund into Court, the Petitioner, now a widow, prayed that one-fourth of the fund might be paid to her; and as to the remaining three-fourths, that the deeds might stand as a security only for the moneys actually advanced, with interest and costs.

The Petitioner's title to one-fourth of the fund absolutely not being disputed:—

Held, that the remaining three-fourths of the fund must stand as a security only for the sums actually advanced, with interest and costs:

Held, further, that the mortgagee was entitled to only six years' interest, notwithstanding that the proceeding was by petition for payment out of the fund.

PETITION.

By an indenture of settlement dated the 13th of September,

V.-C. B. 1879 *In re* SLATER'S TRUSTS.

1833, the Rev. *Thomas Slater* covenanted with two trustees to pay to them during the lives of *John Fowkes* and *Abigail* his wife, and the life of the survivor, an annuity of £104 for the benefit of them and the survivor of them, and appointed certain real estates in *Northamptonshire* to the same trustees, their executors, administrators, and assigns, for the term of 500 years, upon trust, first, to secure the annuity, and then, in case of the death of the survivor of *John* and *Abigail Fowkes*, there should be any child of *Abigail Fowkes* by *John Fowkes* then living, or who should have attained twenty-one or marriage, upon trust out of the rents and profits, or by mortgage or sale, to raise the sum of £1500 and interest at 4 per cent., and stand possessed of the same in trust for all and every the children of *Abigail* by *John Fowkes*, who being a son or sons should attain twenty-one, or being a daughter or daughters should attain twenty-one or marry, to be paid, assigned, and transferred at twenty-one or marriage.

Thomas Slater died in 1837.

There were issue five children of the marriage, namely, the Petitioner, *Mary Ann*, now Mrs. *Corby*, widow, *William*, *John*, *George*, and *Elizabeth*.

In 1855 *Elizabeth Fowkes* died having never been married; and in January, 1858, *John Fowkes* the elder died, so that at the date of the transaction next mentioned, the widow *Abigail Fowkes* and four children of the marriage were living.

In the course of the year 1858 the four children of Mrs. *Fowkes* applied to one *Thomas Barber* for a loan, and it was agreed that an advance should be made to them of £250 on interest at 5 per cent.

By an indenture dated the 22nd of December, 1858, and expressed to be made between *John Corby* and *Mary Ann* his wife, *John Fowkes*, *William Fowkes*, and *George Fowkes*, of the first part, *Abigail Fowkes*, widow, of the second part, and *Thomas Barber*, described as of *Brayfield-on-the-Green*, in the county of *Northampton*, "carpenter and wheelwright," of the third part, it was witnessed that in consideration of £500 that day paid by *Barber* to the parties thereto of the first part, they the said parties thereto of the first part assigned to the said *T. Barber* the said sum of £1500 by way of mortgage to secure the repayment of £500 and interest at £4 per cent.

A receipt for £500 signed by Mr. and Mrs. *Corby* and *John*, *William*, and *George Fowkes* was indorsed on this deed. The execution of the deed and the signature of the memorandum by the parties of the first part were both attested by *William Harris*, clerk to Messrs. *Scriven & Terry*, solicitors, *Northampton*.

Notwithstanding the statements in the deed, the sum of £250 only was advanced and paid by *Barber;* and on the 22nd of December, 1859, a sum of £12 10*s*., being interest at the rate of 5 per cent. on £250, was paid to or on behalf of *Barber*.

In 1860 the family again applied to *Thomas Barber* for a further advance, and a further sum of £150 was agreed to be advanced to them.

On the 12th of June, 1860, an indenture was executed between the same persons as were parties to the former indenture. This deed recited the former indenture, and went on to recite as follows:—

"And whereas the consideration of the said sum of £500 was the payment in present money of the sum of £250, being one half only of the amount of the sum thereby secured, it being then considered that the difference between the said payments in cash and the sums secured by the said recited indenture was a fair and reasonable remuneration only for the delay in payment of the same until after the decease of the said *Abigail Fowkes*."

It then recited the application for and agreement to advance the sum of £150, and witnessed that in consideration of £150 paid by the said *T. Barber* to the parties thereto of the first part, they the said parties thereto of the first part charged the said sum of £1500 with the payment to the said *T. Barber* "not only of the said sum of £500 so secured as aforesaid, but also of the further sum of £300 on or at the decease of the said *Abigail Fowkes*." Then followed a covenant to pay "the said sum of £300 accordingly," and also to pay interest on the said sum of £150 at the rate of 5 per cent. half-yearly until payment should be made of the £300 thereby secured, and that the provisions of the former deed should be applied for securing the payment of the £300 and interest. The deed then continued:—

"And the said parties hereto of the first part do hereby specially declare that the nature and effect of this security and the terms

V.-C. B. 1879 *In re* SLATER'S TRUSTS.

thereof have been well considered and are perfectly understood by them and each of them, and that the sum of £300 and interest hereby secured is a reasonable and fair equivalent only to the said *Thomas Barber* for the present payment of the sum of £150, taking into consideration the payment by the said *Thomas Barber* of the expense of preparing and executing this security, the age and state of health of the said *Abigail Fowkes*, and other circumstances, and inasmuch as the said *Thomas Barber*, his executors, administrators, and assigns, will be prevented from applying or employing the moneys so advanced and paid in his or their trade or business, or otherwise, during the lifetime of the said *Abigail Fowkes;* and, further, that the terms and conditions accepted and entered into by the said *T. Barber* have been made and offered to several other persons who have declined to advance money thereon."

The deed then contained a covenant by *T. Barber* not to require or take any proceedings for enforcing payment of any part of the principal sum thereby secured before the decease of *Abigail Fowkes*, "except only in case of the non-payment of interest on the sum advanced, for the space of two calendar months after the same shall become due and then owing, for the sum actually advanced and paid, but so nevertheless that the sum so to be recovered shall not discharge the said extra or double amount to be received on the death of said *Abigail Fowkes* as aforesaid."

Upon this deed was indorsed a receipt for £150 by the parties of the first part. The execution of this deed and the signatures to the memorandum were attested by both *W. Terry* and *Thomas Scriven.*

By another deed of even date with the last, purporting to be "an agreement and declaration," and expressed to be made between the same persons as were parties to the two former deeds, after reciting the two former deeds, it was recited as follows:—

"And whereas in truth and in fact the sum of £250 only was or was intended to be paid and advanced by the said *Thomas Barber* unto the said parties hereto of the first part instead of the aforesaid sum of £500, inasmuch as it had been, previously to such advance, understood and agreed by and between all the said parties hereto that for all advances made by the said *Thomas*

Barber on the security of the said sum of £1500 and premises he should receive double the amount thereof respectively at the decease of the said *Abigail Fowkes*, in consideration of his agreeing to pay all expenses of preparing and executing the security necessary for securing the same, and of his having agreed not to call for any portion thereof until the decease of the said *Abigail Fowkes*, and further, that interest should be payable from time to time half yearly upon the sums actually advanced only, but the said security was drawn in the ordinary way of mortgage for convenience only, and upon the supposition only that the same would facilitate the receiving of the said sum of £1500 by the said *Thomas Barber*, his executors, administrators, or assigns, from the executors of the said *Thomas Slater*, or other the parties who might be liable to pay the same when the same should become payable." The deed then witnessed that *Barber* agreed not to require or take proceedings for enforcing payment of the sums of £500 and £300, or any part thereof, before the death of *Abigail Fowkes*, "except only on non-payment of interest on the sums so advanced" for the space of two months, "and then only for the sums actually advanced and paid."

The deed then continued as follows:—

"And the said parties hereto of the first part, for themselves respectively and for their respective executors and administrators, do hereby acknowledge, undertake, and agree with and to the said *Thomas Barber*, his executors, administrators, and assigns, that before the execution of the said several securities respectively, it was fully explained to them, and they did thereby intend and agree that the said *Thomas Barber* should, after the decease of the said *Abigail Fowkes*, have and receive out of the said sum of £1500, the said several sums of £500 and £300 respectively, being double the amounts actually paid by him, but with interest in the meantime upon the respective sums actually advanced and paid by him only, and which arrangement they the said parties hereto of the first part, after due consideration and explanation, did then and do now consider to be fair and reasonable, considering the age and state of health of the said *Abigail Fowkes*, and that the said *Thomas Barber* had agreed to pay such expenses as aforesaid, and that he, his executors, administrators, or assigns, would be prevented

V.-C. B. 1879 *In re* SLATER'S TRUSTS.

from applying or employing the moneys so advanced and paid, in his or their trade or business, or otherwise, during the life of the said *Abigail Fowkes;* and further, that the same terms and conditions which have been accepted and entered into by the said *Thomas Barber* for advancing money on the said security were offered by and on behalf of the said parties hereto of the first part to several other persons who were in the habit of lending money on security, but who declined to make advances thereon."

By an indenture dated the 27th of February, 1861, and expressed to be made between *Thomas Barber* of the one part, and *Thomas Scriven* of the town of *Northampton,* gentleman, of the other part, after reciting as follows: "And whereas the said *Thomas Barber* having occasion for the sum of £400 some time since applied to the said *Thomas Scriven* to lend him the same, which he agreed to do on having the repayment thereof secured in manner hereinafter mentioned: And whereas the said *Thomas Scriven* hath already advanced and paid the said sum of £400 to the said *Thomas Barber,* as he doth admit and acknowledge;" it was witnessed that "in consideration of the sum of £400 unto the said *Thomas Barber* at or before the execution hereof paid by the said *Thomas Scriven,*" the said sum of £1500 and all the shares and interests of Mr. and Mrs. *Corby* and *William, John,* and *George Fowkes* therein, were assigned by *Barber* to *Scriven* by way of mortgage to secure £400 and interest at £5 per cent., and *Barber* thereby irrevocably appointed *Scriven* his attorney to sue for and recover all sums of money becoming payable to Mr. and Mrs. *Corby* and *William, John,* and *George Fowkes* under the deed of the 13th of September, 1833. Upon this deed was indorsed a receipt for £400 by *Thomas Barber.* The execution of the deed and signature of receipt were attested by *W. Terry,* of *Northampton,* solicitor.

In 1863 *John Fowkes* died, and his widow, now *Sarah Ann Smith,* became his administratrix. In 1866 *George Fowkes* died, and the Petitioner, *Mary Corby,* whose husband, *John Corby,* died in 1874, became his administratrix.

On the 15th of April, 1876, *Abigail Fowkes,* the tenant for life, died.

In 1878 the £1500 was raised and paid to *Peter Roberts,* the

then trustee of the settlement, who released the real estate, and, on the 6th of January, 1879, paid into Court the fund, which was now represented by a sum of £1575 cash, upon an affidavit, stating the above deeds, and then stating to the following effect :—

Mary Ann Corby now alleged that inasmuch as the two indentures of mortgage and further charge were not acknowledged by her, they were not binding upon her share in the fund; also that the deeds were improperly obtained, and were not good and valid securities for the sums purporting to be thereby secured. Notices had been received from *Scriven* of the assignment to him of the 27th of February, 1861; also from one *Samuel Monk* of an alleged charge on the fund dated in September, 1864, the existence of which charge *Barber* did not admit; also from the *Northamptonshire Banking Company* of an assignment in January, 1867, by *Barber* to two of their directors, to secure £125 and interest. Mrs. *Corby* and *William Fowkes* had also assigned their shares in the £1500 by a deed dated the 9th of June, 1876, to *Thomas Wright*, to secure repayment of certain advances and interest.

On the 28th of January, 1879, this petition was presented by *Mary Ann Corby*, widow, making Respondents *William Fowkes*, *John Smith* and *Mary Ann* his wife, *Thomas Barber*, *Thomas Scriven*, *Samuel Monk*, the *Northamptonshire Banking Company*, *Thomas Wright*, and *Peter Roberts*.

The Petitioner alleged that at the date of the mortgage of December, 1858, the family of the *Fowkeses* were in great poverty and pecuniary distress, and that their only property available for the purposes of a loan consisted of their reversionary interest in this £1500; that whilst in this state of poverty and distress they applied to *Barber*, who agreed to advance them £250 at £5 per cent. The Petitioner understood that £250 alone was to be secured by a charge on the reversionary interest. The deed of December, 1858, was prepared by the solicitors of *Barber*, who were the only solicitors employed, and was signed by the Petitioner, and, as she believed, by her brother, in ignorance that it purported to be a mortgage to secure £500 and interest. *Barber* never claimed interest in respect of any larger sum than £250. The family were in the same distressed circumstances when the loan of 1860 was applied for. The Petitioner alleged that the

V.-C. B. 1879 *In re* SLATER'S TRUSTS.

statements in the clause lastly above extracted from the deed of "agreement and declaration" of the 12th of June, 1860, were untrue. The clause was inserted at the instance of *Barber* and his solicitors. The Petitioner and her brothers had no independent legal advice, and were not in a position to form any proper judgment as to the effect of the deeds of the 12th of June, 1860. The deeds were not read over, and were signed by the Petitioner and brothers in consequence of their pecuniary distress, and their actual indebtedness to *Barber*.

The Petitioner, as representative of her brother *George Fowkes*, submitted that the sums exacted were hard and unconscionable, and such as no persons properly advised and not in pecuniary distress would have acceded to; and that the deeds ought to be allowed to stand as securities for the sums actually advanced only.

On her own behalf the Petitioner submitted that the deeds of mortgage and further charge were, as regarded her share, wholly inoperative and ineffectual, by reason of the same not having been acknowledged by her.

The Petitioner submitted to bringing an action, if the Court should so direct.

The Petitioner prayed for a declaration that the deeds of mortgage and further charge were not binding on the share of Mrs. *Corby;* and that as against the parties (other than herself and *Abigail Fowkes*, deceased) they ought to stand as securities only for the moneys actually advanced, with interest at £5 per cent., and for division and payment of the fund accordingly.

The evidence shewed that no interest was paid after the 22nd of December, 1859.

Thomas Scriven, solicitor, deposed that in 1833 he negotiated on behalf of *Barber* with the Petitioner, and it was finally arranged that the sum of £250 should be advanced to the *Fowkeses* on the security of their reversion, for which *Barber* was to receive £500 on the death of Mrs. *Fowkes*, but with interest in the meantime on the sum actually advanced. He said that though the deed of the 22nd of December, 1858, was "improperly and hastily drawn in the form of an ordinary mortgage," it was well understood by all the parties, except *William Fowkes*, who was absent, that the sum of £250 only was to be paid, and that the £500 was not to be

demanded until the death of Mrs. *Fowkes*. He denied the Petitioner's statement that £250 only was agreed to be secured, and denied the allegation of ignorance. He said that in 1860 *Barber* applied to the deponent "to enable him" (*Barber*) "to make a further advance." It was arranged that the further sum of £150 should be advanced by *Barber* in consideration of £300 being paid to him (*Barber*) on the death of Mrs. *Fowkes*, and the deed of further charge was preferred accordingly. He deposed "that previously to the execution of the said last-mentioned deed the whole of the terms and conditions on which the said loans were advanced, and relating to the repayment thereof and of the interest thereon, were fully and particularly explained to the several parties thereto, all of whom were then present, and were thoroughly understood and agreed to by them. He said that the agreement or declaration of the 12th of June, 1860, was prepared "for the express purpose of preventing any misunderstanding as to the terms on which not only the said original loan, but also the said further advance, was made, and to prevent the said *T. Barber* from requiring or enforcing payment of either of the said principal sums before the death of the said *Abigail Fowkes*, which by the terms of the first deed he might consider himself entitled to do."

He further said that the whole of the agreement and declaration was read over, and the operative part of the deed of further charge, "and to the end thereof," was read over to and in the presence of all the parties of the first part, and the effect and operation thereof fully explained to them.

He claimed out of the moneys paid into Court £400 for principal advanced by him, with interest at £5 per cent. from the 27th of February, 1861, and further, that interest should be paid with half-yearly rests. The total thus claimed by *Scriven* was £972 4*s.* 5*d.* The amount of £400, with simple interest from the 27th of February, 1861, to the 22nd of February, 1879, was £759 14*s.* 6*d.*

Crossley, for the Petitioner:—

The questions at issue can be tried on petition: *Lewis* v. *Hillman* (1). [This was not contested.]

(1) 3 H. L. C. 607, 631.

V.-C. B. 1879 *In re* SLATER'S TRUSTS.

This was a hard and unconscionable bargain: *Croft* v. *Graham* (1); *Beynon* v. *Cooke* (2). The interest of the Petitioner and her brothers was an absolutely vested interest, not defeasible by any contingency; they might have assigned it in the market any day. Only one solicitor was employed, and he the solicitor of the mortgagee. This was the only realized property the family possessed. Under the first deed *Barber* might have called in the money at any moment. The falsehood of the recitals is proved.

The deeds not having been acknowledged by the Petitioner, are not operative upon her share: *Bowyer* v. *Woodman* (3). [This point was conceded.]

The deeds ought to stand as securities only for the money actually advanced, with interest, but for six years only: *In re Stead's Mortgaged Estates* (4).

Henry Fellows, for *Sarah Ann Smith*, the executrix of *John Fowkes*; and

G. O. Edwards, for *Wright*, the incumbrancer, supported the prayer of the petition.

The Respondent *Barber* did not appear.

Shebbeare, for *Scriven*:—

As to the charge of a hard and unconscionable bargain, the cases cited are those of professional money lenders, where there was an exorbitant rate of interest. *Barber* was not a money lender; he is described as a carpenter and wheelwright. The rate of interest charged was not excessive. The reversion was not likely, in 1858 and 1860, to fall in for many years; as a matter of fact, it did not fall in until 1876. There was the possibility of loss of interest, and in fact no interest was paid after the first year.

The 42nd section of the 3 & 4 Will. 4, c. 27, does not limit arrears of interest on a mortgage to six years on a proceeding like this. The mortgagee is entitled to interest since 1861.

(1) 2 D. J. & S. 155.
(2) Law Rep. 10 Ch. 389.
(3) Law Rep. 3 Eq. 313.
(4) 2 Ch. D. 713.

Romer, and *Levett*, for assignees of *Barber* subsequent to *Scriven*:—

The Petitioner's case is twofold. She says, we were poor people in necessitous circumstances, and we did not understand. In other words, she brings a charge of gross fraud. That charge of fraud is displaced by the evidence, which the Petitioner does not contradict; and if that fails, the whole charge fails. If a Petitioner alleges fraud and fails, he cannot succeed on any lower ground.

As to the hard bargain, what did the transaction amount to? The lender was to receive a bonus on the death of the tenant for life. At compound interest in twenty years a sum of money will double itself at 3½ per cent., so that what was charged to these people was 7½ and 8½ per cent., a no very extravagant rate of charge. The petition shews that the security was not easily available. We are in the position of persons entitled to the whole fund. This is a proceeding by the mortgagors against the fund, not a suit by us for the interest, and they cannot take the fund from us, except on the terms of paying us principal and interest for twenty years: *Edmunds* v. *Waugh* (1), which is not disturbed by *In re Stead's Mortgaged Estates* (2).

Crossley, in reply:—

Scriven's evidence does not shew that the borrowers had independent advice; and possibly the reason why Mrs. *Corby* was not taken before a commissioner was to prevent her getting any. As to *Barber* being kept out of his money, he might have assigned at any time, and he actually did mortgage. Suppose the tenant for life had died next day, how would this have differed from the grossest money-lending transaction? *Barber* might have foreclosed at any time. *Scriven* does not say he alluded to this; so that the transaction which he says he explained to the borrowers was not the real transaction. *Scriven*, at any rate, was under no covenant not to sue. Nor is he an impartial witness. The question of fraud has nothing to do with the principle of whether the Court will or will not relieve a mortgagor. The question is, were these people in necessity? were they in ignorance? If *Barber* was anything in this transaction but a mere name, he got

(1) Law Rep. 1 Eq. 418. (2) 2 Ch. D. 713.

V.-C. B. 1879 *In re* SLATER'S TRUSTS.

his money back again directly. *Scriven* was, at the date of the transaction, the actual money lender. The circumstance of whether the borrower is rich or poor does not affect the principle. Nor does want of notice; all the bank took was an equitable assignment of a *chose in action*.

As to the limit of six years' interest, the case is governed by *In re Stead's Mortgaged Estates* (1); *Seton* on Decrees (2); and *Smith* v. *Hill* (3) shews that the fact of the interest being reversionary does not prevent the operation of the 42nd section in barring arrears beyond six years.

BACON, V.C.:—

This is certainly a somewhat singular case.

One part of the Petitioner's claim is submitted to, and has not been contested, namely, that as to which she contends that her own individual rights in this fund are unaffected by her mortgage. There remains the relief which she claims in her representative character upon the property which was the subject of these strange deeds. Now I have heard no shadow of excuse or reason why the security of December, 1858, prepared by a solicitor, and executed by all the persons named as parties to it, should have stated that a sum of £500 had been that day paid by the mortgagee to the mortgagors, when only £250 was actually paid. For that there has been no sort of explanation; but though no explanation has been given, I can suggest one easily enough for myself. Then it is said that the deed was well understood by all the parties, except one who was absent at the time of the execution by the rest. This statement is by no means clear or satisfactory. The borrowing parties were at this time in abject poverty; they were, in the common acceptation of the word, "expectant heirs," and for them it undoubtedly was a grievously hard bargain. The suggestion, rather than statement, however, is, that although £500 was recited in the deed to have been advanced, everybody knew that only £250 was intended to be, and really was, advanced. That is a transaction which appears to me extremely suspicious.

Then came the deed of June, 1860, in which it was recited that

(1) 2 Ch. D. 713. (2) 4th Ed. p. 1056.
(3) 9 Ch. D. 143.

it was considered that the difference between the payment in cash, £250, and the sums secured by the said recited indenture, namely, £500, "was a fair and reasonable remuneration for the delay in payment of the same until after the decease of the said *Abigail Fowkes*." But for what was there to be this "fair and reasonable remuneration?" The £250 was a sum secured by way of mortgage. *Barber*, the mortgagee, had an absolute right to foreclose at any time. Under the second deed he could have foreclosed at any time after non-payment of interest. Then follow a number of palavering, insincere, dishonest recitals, that *Barber* had been to the expense of preparing the securities, that he would be kept out of money which he might otherwise employ in trade, that the terms had been offered to other lenders and refused, and so forth. I entertain the strongest suspicion that *Barber* had no more to do with the loan than I have. But without founding my judgment upon that, I must hold that the utmost which this mortgagee is entitled to, is to hold these deeds as a security only for the money actually advanced. There must, of course, be an account of what is due upon the security.

Then comes the question about the interest. It is said that the case does not come within the statute, because the money has not been recovered in any action or suit by *Barber*. In my opinion that does not dispose of the question. The payment which has been made into Court by the trustees represents the whole fund. Let *Barber's* interest be what it may, the Respondents who oppose this petition, if they had sued for interest, must have used *Barber's* name. If *Barber* himself had wanted arrears of interest he must have taken proceedings in a suit, in which, under the statute, he could have recovered six years' interest, and no more. The period of six years, then, is the limit of his interest now.

With the subsequent mortgagees I have nothing to do. If upon taking the account of what is due to *Barber* for principal, six years' interest, and costs, anything remains for them, well and good; but they can take no more than *Barber* has. If there is nothing to pay them with, so much the worse for them.

The order will be that the fund be divided into four shares; one of such shares will be paid to the Petitioner; out of the other three shares will be paid what on taking the account with six

V.-C. B. 1879 *In re* SLATER'S TRUSTS.

years' interest and costs is found due to *Barber;* and the residue will belong to the representatives of the three mortgagors.

Solicitors: *Smith, Fawdon, & Low; Elwes & Sharp; Brundrett, Randall, & Govett; Hensman & Nicholson; Robinson, Preston, & Shaw.*

V.-C. B. 1879 *Feb.* 27.

SPRATT'S PATENT *v.* WARD & CO.

[1878 S. 155.]

Practice—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26—*Trial of Issues of Fact by Jury.*

Post 657
658-9, 661
12 Ch D. 236

A Defendant to an action in the Chancery Division for infringement of a trade-mark is not entitled as of right, under Rules of Court, 1875, Order XXXVI., to have the action tried before a Judge and jury, but only, subject to the discretion given to the Court by rule 26, to a trial by jury of issues of fact in the action; and such discretion of refusing a trial by jury will be exercised where the issue of fact fit to be tried by a jury is of minor importance as compared with the main questions involved in the action.

ADJOURNED summons on behalf of the Plaintiffs, that notwithstanding the Defendant's notice requiring that this action be tried by a Judge and special jury, the action might be tried before the Judge himself before whom the same had been set down to be tried (Vice-Chancellor *Bacon*).

The action was for the purpose of restraining the Defendants from selling, under the name or title of "*Fibrine Dog Cakes,*" any biscuits not manufactured by the Plaintiffs, or under *Spratt's Patent* (of which the Plaintiffs were the registered proprietors), and from exposing or using any card, so as to intimate or induce the public to believe that any biscuits or articles not of the Plaintiffs' manufacture sold by the Defendants, were manufactured by the Plaintiffs or under *Spratt's Patent.* An account and damages were also claimed.

In their statement of claim as amended, the Plaintiffs brought forward one instance (on the 22nd of February, 1878) of the supply by the Defendants, on a written order indicating Plaintiffs' dog biscuits, of other dog biscuits.

Issue was joined, and the Defendants had given notice that they required the action to be tried by a Judge and special jury.

The Plaintiffs now applied by adjourned summons, that notwithstanding such notice the action might be tried in this branch of the Court, and that the costs of the application might be costs in the action.

Sir *H. Jackson*, Q.C., and *Dauney*, for the summons:—

The right of the Defendant to a trial of issues of fact before a Judge and jury given by Rules of Court, 1875, Order XXXVI., rule 3, is not absolute, but is qualified by the discretion given to the Court by Order XXXVI., rule 26, of directing a trial without a jury in cases falling under that rule: *West* v. *White* (1); and this discretion will be exercised where the action is peculiarly within the jurisdiction of the Chancery Division: *Pilley* v. *Baylis* (2); *Swindell* v. *Birmingham Syndicate* (3); *Sykes* v. *Firth* (before Vice-Chancellor *Malins*, Feb. 8, 1877); *Garling* v. *Royds* (4). This is essentially a Chancery action, and there is no issue of pure fact that can be so severed from the rest of the case as to admit of being tried separately by a jury: *Dent* v. *Sovereign Life Assurance Company* (before Vice-Chancellor *Bacon*, Feb. 13, 1879).

Romer, for the Defendants:—

By Order XXXVI., rule 3, a Defendant, if he gives notice of his desire within a reasonable time, is entitled as of right to a trial by a jury of issues of fact; and though by rule 26 he may, for special reasons, be deprived of this *primâ facie* right, such special reasons must be shewn. As a matter of fact no special reasons have been shewn. The whole question in the action turns upon one alleged instance of improper sale by the Defendants, which is disputed by them, and that is an issue of fact on which the Defendants are entitled to the decision of a jury. All that *Pilley* v. *Baylis* decides is that a Plaintiff, who by bringing his action in the Chancery Division has elected his forum, has no such absolute right to a trial by jury that he can withdraw the trial of the action from the Chancery to a Common Law Division. But

(1) 4 Ch. D. 631.
(2) 5 Ch. D. 241.
(3) 3 Ch. D. 127.
(4) 25 W. R. 123.

V.-C. B. 1879 SPRATT'S PATENT v. WARD & Co.

that does not affect the case of a Defendant who does not select his forum, but is brought here against his will by the Plaintiff. In *Dent* v. *Sovereign Life Assurance Company* it was the application for a jury by the Plaintiff, who had already given notice of trial in this Division and then changed his mind, that was refused.

BACON, V.C.:—

No doubt the clauses in the Act which have been referred to have created considerable difficulty, and it is possible that some verbal critics might think they could be more distinctly expressed; but such as they are we have to deal with them, and the Courts have been required to deal with them on various occasions. It has been argued that the statute has conferred upon the Defendant a right to have this case tried before a jury. The statute has not said that in words or in meaning. What the statute says is that "the Defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to have the issues of facts tried before a Judge and jury, be entitled to have the same so tried." That is not what he has done. He has given notice that he requires to have this action tried before a Judge and special jury, and that is the thing that the Plaintiff objects to.

I have been convinced by the argument for the Defendant, if I did not know it before, that there is only one fact that could by possibility be tried by a Judge and jury, that is, the question whether, on the day mentioned or some other day, biscuits were sold by the Defendants in imitation of or under the name of the Plaintiffs. That is the single fact. But that is not all that the action comprehends. The Plaintiffs allege that, having obtained a patent, or having established a trade of a particular kind, and designated their commodities by a particular name and description, they find that right which they have acquired by that usage interfered with by the Defendant. Am I going to send that to be tried by a jury? Is that fit to go to a jury? On the contrary, it is eminently fit to be tried here. I quite concur with what has been said, that the Court should not deal with this without reasons.

Nor would I deal with this case or any other case without reasons —reasons at all events satisfactory to myself. But I see plainly on this record that there are questions besides that one question of fact that must be submitted to the judgment of the Court, and must be the subject of proof, and argument by counsel. I think that, under Order XXXVI., rule 26, cause is shewn to me why the case should retain its place in this Court, and not go to another Court. What the Defendant asks is to have the action tried by a jury. The only thing the statute gives him is the right, subject to the subsequent provisions of the statute, to have issues of fact tried by a jury. There is only one question of fact which the Defendants could allege which would last ten minutes or a quarter of an hour to be tried here, and I am asked to send this case, which is not a very important one in itself, to be tried before a Judge and jury, because the Defendant thinks he would like that best. There is no ground for it whatever, in my opinion. If I did so, I should fall into the error and vice which the statute was intended to prevent, namely, that of a party being "bandied about" from one Court to another. That is to say, when he is ready to have his case decided, to send him down to *Westminster* or somewhere else, with a great number of witnesses, causing great delay and expense, which the Court ought to prevent. The order will be according to the summons, and the costs of the applicant costs in the action.

Solicitors: *Beetham Batchelor; Foss & Legg*, agents for *J. K. Bartrum, Bath.*

V.-C. B.
1879
Feb. 27.

In re ALLEN.
DAVIES *v.* CHATWOOD.

[1879 A. 10.]

Solicitor and Client—Retainer—Joint or Separate.

In a suit by a shareholder against the seven directors, the secretary and the company, to restrain an action for calls, to be relieved of his shares on the ground of misrepresentation in the prospectus, and to be indemnified by the directors, the Defendants, having all appeared by *A.*, the same solicitor, put in a joint and several answer, signed by one counsel, and joined in their defence, signed three separate retainers to *A.*, all in the following terms:—"You having up to the present time conducted the defence of this suit on behalf of all the Defendants, and, in pursuance of their instructions in that behalf, we the undersigned do hereby confirm such instructions, and request you to continue such defence, and to take such steps as you may consider necessary in the matter":—

Held (affirming the Taxing Master's decision), that the retainers were separate and not joint, and that the assets of the company (in liquidation) were liable for one-ninth only of the costs.

ADJOURNED SUMMONS on the part of *G. P. Allen*, a solicitor, for a review of taxation.

The question was whether the *East Rocks Hematite Iron Ore Company*, in liquidation, were liable upon their retainer to pay the whole of the applicant's bill of costs in a suit of *Davies* v. *Chatwood*, or, according to the Taxing Master's certificate, a rateable portion only.

On the 26th of June, 1874, the company brought an action in the Court of Exchequer against *Davies* to recover payment of calls upon his shares. *Davies* thereupon filed the bill in *Davies* v. *Chatwood* against the seven directors, the secretary, as an officer of the company, and the company in its corporate capacity, for the purpose of restraining the action, and setting aside the contract to take shares, on the ground that he had been induced to take them (in December, 1872) by misrepresentations contained in the prospectus, and also praying that the directors might be held liable jointly and severally to indemnify him against calls in case he remained on the list.

On the 4th of August, 1874, the Plaintiff obtained an injunction

on the terms of paying the money into Court and giving judgment in the action to be dealt with as the Court should direct.

The same solicitor (Mr. *Allen*), acting upon verbal instructions in the first instance, appeared for all the Defendants, and instructed one set of counsel on their behalf, and on the 21st of January, 1875, the joint and several answer of all the Defendants, signed by one counsel, was filed by *Allen*.

In October, 1875, three written retainers in the same form were signed by the Defendants (who resided in different parts of the country) and addressed to Mr. *Allen* and his partner (since deceased). One of these, dated the 19th of October, 1875, signed by four of the Defendants, as directors, and by the secretary, on behalf of the company, was as follows:—

"Dear Sirs,—

"*Davies* v. *Chatwood and Others.*

"You having up to the present time conducted the defence of this suit on behalf of all the Defendants, and, in pursuance of their instructions in that behalf, we, the undersigned, do hereby confirm such instructions, and request you to continue such defence, and to take such steps as you may consider necessary in the matter, and approve of your proceeding to the neighbourhood of the mines for the purpose of obtaining on our behalf evidence in corroboration of the reports made on the formation of the Defendant company, as advised by counsel."

About the same time two other letters in the same form were signed, one by three more of the Defendants, the other by the remaining Defendant.

At the hearing on the 27th of April, 1876, the Defendants all appearing by one set of counsel, the bill was dismissed with costs, and the money in Court to abide the result of the suit was ordered to be paid out to the Defendants, and was, under a power of attorney, received by the solicitor.

Mr. *Allen* made out his bill of costs against all the Defendants, and on the 25th of April, 1878, upon his own petition, obtained the common order for taxation against the company (then being wound up in the Stannaries Court). On the 13th of January, 1879, the Taxing Master (Mr. *Drew*) certified that he had taxed and settled the bill of costs at £314 1*s.* 6*d.*, but of that sum one-

V.-C. B. 1879 *In re* ALLEN. DAVIES *v.* CHATWOOD.

ninth part (£34 17*s.* 11*d.*) only was due from the company to Mr. *Allen*. In answer to objections to this taxation carried in by Mr. *Allen*, the Taxing Master said, "On the taxation it was stated on behalf of the solicitor that he had received from the company such a retainer as made the company liable to pay the whole of the bill of costs notwithstanding that the company was one of nine Defendants, all represented in the suit by the same solicitor. No such retainer was produced to me, and on the adjourned appointment the solicitor failed to satisfy me that he had received any retainer by the company which would make it liable to more than a proportion of the whole costs,"—and disallowed the objections.

Allen had taken out a summons, which was adjourned into Court, for a review of taxation.

Kekewich, Q.C., and *Hornell*, for Mr. *Allen*:—

The retainer given to Mr. *Allen* was in terms a joint retainer (on behalf of the company), and must be so construed, having regard to the circumstances of the litigation, which in the action was by the company as Plaintiffs, and in the suit against the company as Defendants. It being, as we say, a joint retainer, we are entitled to recover the whole costs from each client (in this case from the company), though, if the retainers had been several, each client would be liable for his own portion only of the costs: *Re Colquhoun* (1).

Even though the retainers may have been several in the first instance, the Court will look at the circumstances of the case to see whether the retainers, which may have been in form separate retainers, had become in reality joint from being merged in one litigation, so as to entitle the solicitor to recover the whole of his costs, and not a proportionate part only from the company, for whose benefit the suit was defended from beginning to end: *Anderson* v. *Boynton* (2); *Berridge* v. *Bellew* (3).

Sir *H. Jackson*, Q.C., and *Northmore Lawrence*, for the official liquidator:—

The Taxing Master's certificate, by which the company are liable

(1) 1 Sm. & Giff. App. i.; 5 D. M. & G. 35.

(2) 13 Q. B. 308.

(3) 32 L. T. (N.S.) 807.

for one-ninth only of the costs, is perfectly right, and no case is made for varying it. By obtaining an order to tax against the company separately from the other Defendants, Mr. *Allen* has intimated that he looks to each Defendant severally for his proportion of the costs: *Re Colquhoun* (1); and, upon the words of these three retainers, signed at different times by different batches of Defendants, there is nothing to indicate any intention to make the parties signing them responsible beyond their own proportion of the costs according to the general rule, or to raise the inference of joint retainer. It is clearly established by *Re Colquhoun* that where several Defendants retain the same solicitor, each of them can only be charged with his proportion of the general costs of proceedings taken on behalf of all. *Berridge* v. *Bellew* (2), which has been relied on by the other side, strongly confirms this rule of practice. The defence to the action to recover the bill of costs in that case was, not that the retainer by the Defendant was separate, but that, under an express agreement between him and the Plaintiff (the solicitor), he (the client) was not liable for any portion of the costs; and although the defence upon that ground failed, it is expressly stated (by Baron *Amphlett*) that, if there be no joint retainer, "the mere fact that the several Defendants appear by the same solicitor, that they join in putting in the same answer and attend joint consultations, would not amount to evidence that there was any joint retainer, particularly in cases where the retainers are separate."

Kekewich, in reply.

BACON, V.C.:—

This is a very proper case to bring before the Court in the shape in which it is now presented, because it is unquestionably a matter of principle and not a matter of detail in taxation. The Master's decision, therefore, is subject to revision in this Court. The difficulty would be very great but for the clear rule of practice established by the decision in *Re Colquhoun*, and by the long certificate given by Master *Follett*, which was adopted in the

(1) 5 D. M. & G. 35, see Mr. Follett's certificate (9), p. 37.
(2) 32 L. T. (N.S.) 807.

V.-C. B. 1879 *In re* ALLEN. DAVIES *v.* CHATWOOD.

Court of Appeal, where the matter was discussed. I take the practice to be now settled and distinct. It is said here there is a joint retainer. In one sense there is a joint retainer. There is a suit instituted against the company where the Plaintiff desired to be relieved from his contract with the company, and he asked for alternative relief against the directors personally. There are a variety of topics included in the original suit, in which the Defendants are interested in different degrees. They all agree to this extent, that there shall be one defence presented. How does that touch the principle whether, when the defence has succeeded and the costs have to be paid, any one is to be picked out and made to pay for it? Nobody can suggest any such principle. Everyone, by signing the retainer—I am not thinking of the particular words of it—agrees to make a common case in defending this suit, and they retain Mr. *Allen* to be the solicitor to make a common case. They say, You know our several cases. You know that we, as directors, are charged with fraud, and are asked to give an indemnity: you must procure us protection in those respects. The company was charged with having allotted these shares in a fraudulent or illegal manner, and this knowledge came to the solicitor retained by these several Defendants; and the only thing that is joint on their part is this, "We agree with you that you shall be paid for what you do." How does that affect the question whether the liability of each individual signing those retainers is not for his own share of those expenses only? Certainly the case of *Re Colquhoun* (1) gives no colour or authority for that. It establishes, on the contrary, the well-established practice in the Master's office, that upon a retainer, such as this is shewn to have been, although the solicitor is entitled to the whole of his demand, he is not entitled to pick out any one of the Defendants and say, I will get it from you alone. He has his remedy against any one of the others.

The cases referred to do not touch this principle at all. In *Anderson* v. *Boynton* (2), it was held that the retainers had been consolidated; and if there had been any previous retainer it would have been said here that the retainers were consolidated. Retainers to do what? To defend singly and collectively. *Burridge* v.

(1) 5 D. M. & G. 35. (2) 13 Q. B. 308.

Bellew (1) stands upon a totally different footing, for that decision went upon the ground principally that no such objection as the Defendants there raised could be allowed, because the only thing he had pleaded had been decided against him, and the other he had not raised at the trial. When it is said that the rule is the same in the Court of Chancery as in the Court of Exchequer, as is said by one of the Judges, I do not quite know what that means. I do not know what the rule in the Exchequer is, but I do know what the rule of the Court of Chancery is, and that upon a joint employment for different Defendants, with different rights and different grounds of defence, although they together say, "You the solicitor shall be paid by us all the amount of your costs," they do not thereby say, "Any one of us will pay the whole," but "The shares we shall have to pay you are settled by the practice of the Court—in this case one-ninth—because there are nine parties from whom the payment is to be derived." Nothing prevents the solicitor having his remedy against his eight other clients. He makes out his bill to the nine—including the company, which is right enough, and then, desiring payment, he gets an order to tax the bill against the company. That not only decides nothing in his favour, but the reasonable construction of it is, "I want to get from the company that one-ninth which they owe me," and so the Taxing Master has dealt with it. In this case, as in any other, relying upon the settled course of practice in his Chambers, he makes his certificate. I am at a loss to see any ground upon which it can be said to be wrong. It is a joint retainer to this extent. "We together undertake to pay you, but not that any one of us will pay you all; we jointly contract with you and with ourselves that we will pay you the whole amount of your charges." That is the whole extent of the undertaking. The Taxing Master's certificate is established, and to the extent of one-ninth, and no more, under this order to tax, is the solicitor entitled to an order for either retainer or payment, whichever may be necessary.

Solicitors: *Merriman, Pike, & Merriman*, agents for *Partington & Allen, Manchester; Gregory, Rowcliffes, & Rawle*, agents for *Hodge, Hockin, & Marrack, Truro.*

(1) 32 L. T. (N.S.) 807.

V.-C. B.

1879

March 27.

In re ROTHERHAM'S TRADE-MARK.

Trade-mark—Registration—Regulations of Commissioners of Patents—Words in Foreign Characters—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *ss.* 1, 5, *par.* 3—*Trades Marks Rules*, 1876, *r.* 68.

A regulation having been issued by the Commissioners of Patents forbidding the registration as a trade-mark of any word in foreign characters:—

Held, that such regulation was *ultrà vires* and void.

A firm of watchmakers, who for many years had been in the habit of using the word "*Tod*" painted or engraved in Arabic characters on the dials of watches, as a trade-mark for a particular class of watches, consigned by the makers to a firm of *Tod, Müller, & Co.*, for sale in the East—where the mark was well known—applied to have this trade-mark registered. The Registrar, in obedience to the above-mentioned regulation of the Commissioners of Patents, refused.

The Court ordered the trade-marks register to be rectified by inserting therein the name of the firm as proprietors of the trade-mark.

Affirmed on appl 14 Ch D 588: CA

THIS was a motion under sect. 5 of the *Trades Marks Registration Act*, 1875, that the register of trade-marks might be rectified by inserting therein the name of *Rotherham & Sons* as the proprietors of a trade-mark, which had been advertised under the number 15543 in the *Trade Marks Journal* of Wednesday the 4th of December, 1878, page 678.

The mark in question consisted of a word in Arabic characters, the letters of which, turned into English, would make the word "*Tod*." The applicants, *Rotherham & Co.*, of *Coventry*, watchmakers, had amongst their consignees abroad a firm of *Tod, Müller, & Co.*, and this mark was not used upon any watches manufactured by *Rotherham & Co.* except on those manufactured for, and sent to, *Tod, Müller, & Co.* It was stated that the mark, which had been in use some fifteen years, was well known in the East.

In 1878 the applicants found that the mark had been imitated or counterfeited by some person without their authority, and partly on this account applied for the registration of the mark, but the Registrar refused to register the same, on the ground that the Commissioners of Patents had decided that the mark could not be accepted as a trade-mark within the meaning of the Act. The

Registrar accordingly refused to act upon the application without the leave of the Court.

The reason given on behalf of the Commissioners was, that the fact of the name not being printed in English occasioned some difficulty, as the Commissioners had "no machinery by which they can verify the statement that certain symbols mean a particular name in some given language;" and that they thought they ought to know what it was which they presented to the public as a trade-mark.

To this it was answered in correspondence, that the application was accompanied by a solemn declaration by the applicant that the letters meant the word "*Tod*," and that registration had been granted in the cotton classes for names written in Oriental characters.

The Registrar replied that the matter had been again submitted to the Commissioners of Patents, whose instructions were that the opinion already given by them must be adhered to.

Sir *H. Jackson*, Q.C., and *Moloney*, for the motion:—

That the applicants, *Rotherham & Sons*, are, and have been for many years past, the proprietors of this trade-mark, is undisputed. That being so, their right under the statute, sect. 5, to have the mark registered is clear. What is a trade-mark is defined by sect. 10; and there is nothing in that section or elsewhere in the Act to deprive the proprietor of his right on the ground that the mark is a word in other than English characters.

[BACON, V.C., referred to *Gout* v. *Aleploglu* (1).]

That was under the old law; but the principle is the same, and as such it was recognised by Vice-Chancellor *Wickens* in a case of *Broadhurst* v. *Barlow*, which is unreported, but was referred to by Vice-Chancellor *Malins* in the course of his judgment in *Raggett* v. *Findlater* (2).

Rigby, for the Registrar of Trade-Marks:—

When this application was made to the Registrar, he, in conformity with sect. 1 of the statute, and in obedience to rule 61 (3)

(1) 6 Beav. 69, n.
(2) Law Rep. 17 Eq. 29, 38.
(3) Rule 61 of the Rules (issued in January, 1876) under the *Trade*

V.-C. B. 1879

In re ROTHERHAM'S TRADE-MARK.

of January, 1876, applied to the Commissioners of Patents, with the result that has been stated. Under these circumstances he felt it to be his duty not to register the mark; but he submits wholly to the jurisdiction of the Court, which is established beyond all doubt by sect. 5 of the Act. The only question, then, is one of discretion—whether the regulation made by the Commissioners of Patents—not that no foreign word, but that no word in foreign characters, shall be registered as a trade-mark—is a reasonable one, and such as the Court will sanction and uphold. The case of *In re Orr Ewing's Trade-Marks* (1) differed from this; but the general principle laid down by Lord Justice *James* will apply, namely, "that the High Court, in dealing with a case dealt with by them" (in that case, the Committee of Experts) "should not interfere with their decision, unless satisfied that they have proceeded on some wrong principle, or in some improper manner."

By the refusal of registration no right which the applicant now possesses is taken away from him. His common law right of action is not taken away; all he is deprived of are his statutory remedies.

The regulation of the Commissioners was founded upon their practical knowledge of the difficulties which would arise if registration of names in foreign characters should be permitted.

[It was stated in the course of the argument that the order in *In re Orr Ewing's Trade-Marks* was under appeal to the House of Lords.]

BACON, V.C.:—

It cannot be said that the question raised before me is not one of importance, because the construction of this Act of Parliament —being passed as it was for general, public, and useful purposes—

Marks Registration Act of 1875 is as follows:—"The registrar, in the exercise of his powers, duties, and discretion under the Act and these Rules, shall be subject to the superintendence of the Commissioners of Patents, and shall conform in every case to any instructions, directions, orders, or rules (general or special) that may be issued, given, or made by such Commissioners, or any one of them, and he shall in all cases of doubt be entitled to refer to the said Commissioners, or any of them, for instructions."

(1) 8 Ch. D. 794.

is matter of interest and importance to everybody concerned in trade, and probably to other people.

The Act of Parliament is plain. The policy of the law was this: disputes having existed heretofore about trade-marks, the Legislature said, "Now for the future we will have registration, so that there shall be no doubt about a man's title to a trade-mark when it is registered." Then the statute points out in very distinct terms what may be registered and what does constitute a trade-mark, and the things which constitute a trade-mark are: "A name of an individual or firm, printed, impressed, or woven; a written signature or copy of a written signature, a distinctive device, mark, heading, label, or ticket; and any special or distinctive word or words, or combination of figures or letters." Therefore the statute confers upon the whole community a plain legal right to have these marks registered if they come within that description. It is not disputed that the description here is perfectly accurate. The mark upon the watch dial is a distinctive device or mark; the meaning of it is explained by the affidavit, and that shews that it was in itself a very proper mark for the purpose of distinction. The case I have referred to of *Gout* v. *Aleploglu* (1) was hardly distinguishable from the present. The Vice-Chancellor there granted an injunction to restrain the Defendant "from sending or permitting to go to *Constantinople* and *Turkey*, or any other place, and from selling and disposing of any watches with the names of the Plaintiff thereon in Turkish characters, and also to restrain the Defendant from manufacturing or vending such watches." If it stood upon the old law, therefore, there can be no doubt about a trade-mark proprietor's right to maintain an injunction to restrain that which the present applicant says is being done in this case. But here the trade-mark proprietor who is the present applicant has applied, under the statute, for registration, and the Registrar, acting under the direction of the Commissioners of Patents, declines to give him the registration he asks for, and furnishes the reason why he refuses it. He says it is, that this mark is not in English, and that therefore he does not know what he is presenting to the English public if he registers this mark. That of itself is a most insufficient reason, because

(1) 6 Beav. 69, n.

V.-C. B. 1879 *In re* ROTHERHAM'S TRADE-MARK.

the right conferred by the statute is to have any "distinctive device" registered. Suppose there was in Turkish characters the word "Victory," or "Glory" (perhaps it would be a happier thing to say "Peace and Plenty"), that would be a device which the proprietor would be entitled to have registered. And what have the English public to do with that? If there was any word to be found in the statute which required the owner of a trade-mark in *England* to express that in English, there might be some ground for the suggestion that the reason given by the Registrar (derived from the Commissioners, I am aware) justified his refusal.

The Commissioners' power to make rules is very extensive, but there is no power to repeal an Act of Parliament. They must not make rules to repeal an Act of Parliament. The Act of Parliament has given the applicant the right which he asks for here. I am of opinion, therefore, that even if there had been a more distinct rule, and if it had echoed that suggestion contained in the correspondence, upon which I do not desire to lay unnecessary stress, it would have been a most insufficient reason, and one which I cannot consider would have been binding upon me, because I cannot recognise any authority in the Commissioners of Patents to repeal an Act of Parliament, or to take away from any of Her Majesty's subjects the right which that statute has conferred upon them.

But then it is said that something like this existed in the case of *In re Orr Ewing's Trade-Marks* (1). Well, first of all, that case is under appeal in the House of Lords, and that would prevent me from following it implicitly, although, of course, I should treat it, as I always do the decision of the Court of Appeal, with the utmost respect, and with perfect readiness to follow anything that Court has decided. But the difference is most marked. The applicant here does not want to sue anybody; he wants to be in the enjoyment of his own property. He desires to have his trade-mark registered, that he may assert the rights which the statute gives him. The question arises not with any other person; the applicant has nothing to do with Committees of Experts, or with considering whether they decide wisely or not, and the decision given in the Court of Appeal was this: they said in effect, "You may have the

(1) 8 Ch. D. 794.

certificate in the meantime, which will dispense with the necessity imposed upon you by the statute of registering your trade-mark before you sue for infringement." But that is not the case before me. Nor has the case of *Orr Ewing & Co.* any application whatever to this case, although I listened to it with the greatest interest, and should follow it with perfect respect if I thought it was a decision applicable to this case. What I find here is a clear legislative title given to the proprietor of a trade-mark. The words of the statute are clear and plain, and the reason suggested why effect has not been given to those words is to me a most insufficient reason. It is that the Commissioners of Patents have said, "We will not register any trade-mark which is not expressed in English words or letters, or intelligible to the English public." I say that would be *ultrà vires* of the Commissioners. That would be repealing an Act of Parliament. That would be adding an enactment which the Act of Parliament at present does not contain, and therefore I cannot attend to that.

In my opinion the applicant is perfectly entitled, upon the evidence before me and upon the words of the statute, to have his trade-mark, which is shewn upon the watch dial before me and described in the journal in much larger characters, but identical in shape and form, registered as his property under the *Trade Marks Registration Act.*

There will be an order in the terms of the notice of motion.

Sir *H. Jackson* asked for costs in the nature of damages against the Registrar.

BACON, V.C., observed that if the rules under the statute had given powers to the Commissioners in such terms as to lead them to suppose they might act in contravention of the statute, the Registrar was not to blame for that. He could not give the applicants any costs; but neither could he give any to the Registrar.

Solicitors: *Whateley, Milward, & Whitehead; The Solicitor to the Treasury.*

V.-C. H.

1879

Feb. 3.

In re CREDIT COMPANY.

Proposed Voluntary Winding-up—Petition for a Compulsory Winding-up—Affidavit by Managing Director in Opposition—Short Notice by Petitioner's Solicitor to inspect Company's Books—Rules of Court, 1875, *Order* XXXI., *rr.* 14, 15, *et seq.—Register of Mortgages—Companies Act,* 1862, *s.* 43.

In opposition to a petition presented by a shareholder, whose shares were fully paid up, for a compulsory winding-up order, the managing director filed an affidavit, in which he stated what were the liabilities and assets of the company as shewn by the company's books.

The solicitor of the Petitioner gave notice in writing to the solicitor of the company that he would attend at the company's office upon the morrow morning to inspect the books which had been referred to, and on his attending in pursuance of the notice given the previous afternoon, the secretary of the company refused inspection of the books and also of the register of mortgages.

Upon motion, *held*, that the refusal to allow the solicitor to inspect was a refusal to the Petitioner; that as regarded the register of mortgages, the Petitioner, his solicitor or agent, was, under sect. 43 of the *Companies Act*, 1862, entitled to inspect it; and that as regarded the company's books, the notices required by Rules of Court, 1875, Order XXXI., rules 14, 15, *et seq.*, had not been given, and therefore there would be no order to inspect.

THE shareholders of the *Credit Company, Limited*, at a general meeting passed a resolution that the affairs of the company should be wound up voluntarily, but under the supervision of the Court. Two petitions, one by Mr. *Morrison*, and the other by Mr. *Hudson*, were presented for a compulsory winding-up order. These petitions had come before the Court upon two petition days, and been ordered to stand over till Friday the 7th of February. *Hudson* was a holder of fully paid shares.

In reference to *Hudson's* petition, Mr. *Webster*, the managing director of the company, on the 17th of January, 1879, filed an affidavit, in which he stated that the assets were sufficient to pay the creditors in full and leave a surplus of £452,013 for distribution amongst the shareholders, and gave figures in support of his statement which he said were taken from the company's books, and from his knowledge of the company's business gave, in his opinion, a fair estimate of what ought to be the result of the company's liquidation if the company were wound up voluntarily at the least cost reasonably possible, with care and proper management.

V.-C. H.
1879
In re
CREDIT
COMPANY

In an affidavit made by a member of the firm of solicitors of *Hudson*, it was stated that Mr. *Webster*'s figures differed from those which had been set forth in a letter written by the secretary of the company by the direction of Mr. *Webster*; and the same solicitor on the 31st of January, 1879, wrote a letter to Mr. *Andrew*, the solicitor of the company, to the following effect:—

"Dear Sir,—We propose to attend at the company's office to-morrow at eleven o'clock to inspect the books to which Mr. *Webster* makes reference in his affidavit. Kindly see that directions are given to the officials of the company to produce them to us."

Clause 105 of the articles of association was as follows: "The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the company (or any and which of them) shall be open to the inspection of the members, and no member shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorized by the directors or by a general meeting."

On applying at the office of the company pursuant to the notice of the 31st of January, the solicitor of *Hudson* was refused inspection of any of the books of the company. He stated that without such inspection he was unable to test or answer the affidavit of Mr. *Webster*. He also stated that the inspection of the register of mortgages was at the same time refused to him by the secretary of the company.

This was an application, in pursuance of special leave given on Saturday the 1st of February, 1879, on behalf of *Hudson*, "that the Petitioner, his solicitor or agent, may be at liberty forthwith to inspect and take extracts from the books of the company referred to in the affidavit of Mr. *Webster*, as well as the register of mortgages or other book or books containing entries of a mortgage or charge affecting the members of the company."

An affidavit was made in reply that many books would have to be referred to, and that it would take considerable time, even with the assistance of many clerks, to go through them to test the figures.

V.-C. H. 1879 *In re* CREDIT COMPANY.

Dickinson, Q.C., *Hastings*, Q.C., and *Owen*, for the applicant:—

The application to inspect the register of mortgages is made under the 43rd section of the *Companies Act*, 1862, which in effect enacts that every limited company shall keep a register of all mortgages and charges affecting the company, and certain penalties will be incurred if what is prescribed by the section is not attended to, and "the register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times, and if such inspection is refused" certain penalties will be incurred. It is therefore the right of *Hudson* to inspect the register, and not only himself, but his solicitor or agent: *Williams* v. *Prince of Wales Life Assurance Company* (1).

The applicant wants to know from an inspection of the books how Mr. *Webster* was able to state what are the debts and assets of the company, and it is surprising that he should have met with any opposition to his application, for by Rules of Court, 1875, Order XXXI., rule 14, "Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof."

There being a proceeding before the Court in which one of the parties has made an affidavit, and therein referred to certain documents, it is asked that he should be ordered to produce them for inspection, so that the applicant, his solicitor or agent, may have an opportunity of testing their accuracy, and if such an order should be refused Mr. *Webster* will have to be cross-examined upon his affidavit. There is no desire to harass the company, and therefore all that is sought for is an inspection of those parts of the books which enabled Mr. *Webster* to set forth the particular figures which he has stated in his affidavit, and if Mr. *Webster* be cross-examined he must produce these books: *In re Emma Silver Mining Company* (2). An order is therefore asked for in the terms of the notice of motion.

(1) 23 Beav. 338. (2) Law Rep. 10 Ch. 194.

Morgan, Q.C., *Dauney*, and *H. B. Buckley*, for the company:—

This is a case in which the company are obliged to stand upon their strict rights, as Mr. *Hudson's* shares have been fully paid up; and it is submitted that the application is not *bonâ fide*, but made by his solicitors for hostile purposes against the company. It will be very inconvenient if *Hudson's* solicitors be allowed to look through the whole of the company's books. What are the strict rights of the applicant in reference to inspecting these books, and how do they arise? There has been no winding-up order made by the Court, and therefore sects. 115 and 156 of the *Companies Act*, 1862—the only sections which have any reference to the point—do not apply; but even if they did, the applicant must shew special circumstances, which he has not done: *In re Joint Stock Discount Company* (1).

The 105th clause of the articles of association shews that the applicant has no right to inspect these books without special leave. Then, has he any right under the Rules of Court, 1875? The decision in *In re Emma Silver Mining Company* was before the passing of the *Judicature Act*, and the observations there made by the Lords Justices are in the company's favour. The rules under Order XXXI. were designed to put a stop to questions like that which arose in that case. These rules must be read as a whole. Rule 15 states that notice to produce any documents shall be in the Form No. 10 in the Appendix (B.), and the notice prescribed has not been served in this case. Then it is clear that by rule 16 certain days are allowed before any inspection can take place. The whole of these rules are very precisely stated, yet the applicant has not complied with any particular in them. It may be that Mr. *Hudson* has no right to present a petition for a winding-up order, and if so, he certainly will not under these rules be entitled to inspect the books. He is not entitled as a matter of course to have the inspection which has been asked for, and it is submitted that the application ought to be refused. It is not denied that *Hudson*, a member of the company, has a right under the 43rd section to see the register of mortgages, but he never asked to see it. The section says nothing about "solicitor or agent" having a right to see it, and therefore the secretary acted rightly in refusing

(1) 15 W. R. 99.

V.-C. H. 1879 *In re* CREDIT COMPANY.

inspection, except to *Hudson* himself; but the company are willing to allow his solicitor to see the register as a matter of favour.

Dickinson, in reply.

HALL, V.C.:—

As regards the register of mortgages, I am of opinion that there has been a refusal by the company to allow a shareholder to inspect it, though it has been contended that there was no refusal to him but to his solicitor. I consider that the refusal was to produce to the applicant, and that there was no ground for that refusal.

As regards the other part of this application, the question is one of more difficulty. The notice to produce the books was given on the 31st of January. [His Lordship read the notice.] The application to inspect upon the following morning, the applicant had no right to make under any rule of the *Judicature Act*. If the books had been sufficiently described, he had a right to ask to inspect them, but only in the way pointed out by Rules of Court, 1875, Order XXXI., and the Forms in the Appendix referred to. Assuming that the notice given had been in a sufficient form (and the applicant was not, I think, bound to follow the very words of the Forms given in the Appendix), still he had no right to say that he required to see these books on the morrow morning. He had a right to give a proper notice, and then certain consequences would have followed from it, *i.e.*, the person applied to would have had a time allowed in which to do certain things, and then other stated times would have been allowed to the parties; but none of this has been done. The proceedings have been irregular in some respects, but not so in others, and the order will be that, under the 43rd section of the *Companies Act*, 1862, the applicant—a member of the company—his solicitor or agent, be allowed to inspect the register of mortgages; and as to the other part of the application, I do not make any order. I make no order as to costs.

Solicitors: *Harper, Broad, & Battcock; E. Andrew.*

MOORE *v.* DAVIS.

V.-C. H.
1879
Feb. 3.

[1877 M. 265.]

Partnership—Building Speculation—Agreement to provide Capital—Services rendered—Division of Profits and Losses—Agreement not to be construed as a Partnership.

An agreement in reference to a building speculation upon the *S.* estate, bought with the money of *A.*, provided that *B.*, in consideration of his services to enable *A.* to realize the estate, should be paid one-half of the profits after *A.* had made certain payments; that *B.* should bring in a third of certain fees which he might receive from builders, and bear one-half of any losses, and generally it was agreed that he should receive and bear one-half of the profits and losses upon the whole transaction; but the agreement was not in any way to be construed into a partnership between the parties, and should wholly and solely relate to the *S.* estate. *B.'s* services were to be the consideration for the agreement, and he was not to charge for his time and trouble, but only actual disbursements made by him for the benefit of the estate and for realizing it for *A.* and *B.'s* mutual benefit:—

Held, that the agreement constituted a partnership between the parties, and a dissolution was declared.

THE Plaintiff, in his statement of claim, said that he and the Defendant, in June, 1876, verbally agreed to buy and realize for their joint benefit as a building speculation the *Starfield* estate in *Middlesex*, it being arranged that the Defendant should furnish the necessary capital, and that the Plaintiff should give his knowledge and experience as a practical land agent and surveyor, and superintend and control the building operations to be carried out on the property. The profits and losses arising from the speculation were to be shared between the parties equally. The agreement was not reduced into writing until the 20th of February, 1877, when the following was prepared by the Defendant and signed by both parties:—

"*Starfield.*

"Dear Sir,—In consideration of your services to enable me to realize the above estate I hereby agree to pay you one-half of the entire profits that I derive therefrom after paying the purchase-money of £8000 and £150 survey fees, together with interest that I pay on the unpaid purchase-money, and any legal charges that

V.-C. H. 1879 MOORE v. DAVIS.

I may have to pay the vendor's solicitors, and also all my own solicitor's charges, and of those incidental to the estate, auctioneer's charges, and also bonuses I pay for money to work the estate, besides interest for money that I may advance or borrow for the use of the estate, the rate of such interest to be left to my control; and you to allow to me my third of the fees you receive or charge to account to builders or others, and you to bear the half of any losses there may be in respect of any transactions, and generally you are to receive and bear one-half of the profits and loss upon the whole transaction; but this agreement is not in any way to be construed into a partnership between us, and only and solely to relate to the above estate, and you are not to charge my credit in respect thereof without my written consent; and, further, you are not to question or require vouchers to any account that I may render in respect thereof, or to consider any payments in respect of bonuses, auctioneer's or legal charges or payments of interest, or charges for advances made by or through me to be excessive or exorbitant, but that the same are to be left to my discretion or entire control. Your services to be the consideration for this agreement, and you are not to charge for your time and trouble, but only actual disbursements made by you for the benefit of the estate and with the view of realizing the same for our mutual benefit; the same paragraph to equally apply to myself, but I am to be allowed railway fares, cab hire, and hotel expenses."

The Plaintiff, before signing his name, added,

"I fully agree to the above terms in all respects."

The Plaintiff and the Defendant (as the former alleged) took possession of the estate, and the Defendant had, by selling and letting parts of it, received moneys and thereout paid the purchase-money for, and other sums connected with, the estate; and in August, 1877, he conveyed to the Plaintiff certain plots of it on account of his moiety, and in September he paid to the Plaintiff on account of the profits arising from the estate the sum of £50. The Plaintiff claimed a large sum as being due to him, and he had requested the Defendant to convey the remainder of his moiety and to pay him his share of the moneys realized, but the Defendant had refused to do so, had appointed another surveyor,

had refused to allow the Plaintiff access to the estate, and had excluded him from all participation in the management of it. The Plaintiff claimed (his writ being issued on the 20th of August, 1877) to have a declaration that he and the Defendant were partners in respect of the purchase and sale of the estate, and in the profits and losses arising therefrom, and an account of the dealings and transactions of both parties in respect of the estate and of such partnership; an order for payment of what might be found to be due from either party; an injunction to prevent the selling or letting any part of the estate without the Plaintiff's consent and concurrence; and a receiver of the rents and profits.

The Defendant, in his statement of defence, denied the allegations of the Plaintiff, and stated that he on his own account purchased the estate in January, 1877, and was alone let into possession of it. That he engaged the Plaintiff to act for him in laying out and managing the estate, and that thereupon the above agreement was entered into between them; but except as therein provided, the profits and losses from any building speculation to be carried out on the estate were not to be shared between them equally. The Defendant set forth the sums which had been received and paid by him on account of the estate, stated that the Plaintiff neglected his duties as surveyor, and that the Defendant had transferred certain plots of land to the Plaintiff on account of anticipated profits, but they were not conveyed to him on account of his alleged moiety; and the Defendant also stated that the action was premature and ought to be dismissed with costs.

The question was whether the above agreement constituted a partnership between the parties.

Hastings, Q.C., and *W. King*, for the Plaintiff:—

It is submitted that the language of this agreement constitutes a partnership between the parties, and in support of this contention three leading incidents in it may be of importance to notice. The Defendant on his part agreed to pay one-half of the entire profits that he derived in realizing the estate, and then, after setting forth certain payments which were to be deducted, said, "and you to bear the half of any losses there may be in respect of

V.-C. H. 1879 MOORE v. DAVIS.

any transaction, and generally you (the Plaintiff) are to receive and bear one-half of the profits and loss upon the whole transaction." Any agreement to share profits and losses constitutes a partnership: *Lindley* on Partnership (1); *Stocker* v. *Brockelbank* (2).

Next, there are the words which the Defendant inserted in reference to the not charging his credit in respect of the estate without his written consent; and further, the Defendant required that the Plaintiff should allow to him "my third of the fees you receive or charge to account to builders or others." Against all these stipulations in support of a partnership, the only one which may be urged in opposition to such a contract are the words, "this agreement is not in any way to be construed into a partnership between us," but the following words, "and only and solely to relate to the above estate," made the meaning of those words clear, viz., that the partnership was not to be a general one, but confined to this estate; therefore it is submitted that the Plaintiff is entitled to a decree.

Dickinson, Q.C., and *Stallard*, for the Defendant:—

It was agreed between the parties that this agreement should not be construed into a partnership, and they must abide by their own contract as between themselves. Because the Plaintiff and Defendant agreed to divide the profits and losses, there might be the legal incident of partnership as regards third parties; but this is not an action by a creditor seeking to make both these parties liable as partners on the ground that the transaction entered into was one of partnership. The question is, have these persons constituted themselves partners by virtue of this agreement? and it is submitted that, although as between third parties that question might be answered in the affirmative, yet as between themselves it was a contract of hiring and service, and not one of partnership.

[They referred to *Hesketh* v. *Blanchard* (3).]

Hastings, in reply, referred to the cases of *Mair* v. *Glennie* (4) and *Green* v. *Beesley* (5).

(1) 3rd Ed. p. 19.
(2) 3 Mac. & G. 250.
(3) 4 East, 144.
(4) 4 M. & S. 240.
(5) 2 Bing. N. C. 108.

HALL, V.C.:— V.-C. H.

1879

MOORE v. DAVIS.

It appears to me, looking at the whole of the document, that there was a contract created by it between the parties which, according to the words of the Lord Chancellor in his judgment in *Stocker* v. *Brockelbank* (1), gave the Plaintiff an interest arising out of the contract, which by law enured as a partnership, although perhaps contrary to the intention of the parties. The contract begins with the mention of the services which were to be rendered by the Plaintiff to enable the Defendant to realize the estate, and the agreement by the Defendant to pay the Plaintiff one-half of the profits that he might derive therefrom: and if I stopped at that part of the document I should say it looked very much like a case of hiring and service, as was decided in *Stocker* v. *Brockelbank;* but when I pass on I find that the arrangement was that the Plaintiff should bring into account a third of the fees which he received—something which he would bring in for the part which he would take in reference to the realization of the estate, *i.e.*, he would receive certain fees for portions of the estate from builders or others, and those fees were to be brought into account. Then the agreement was that the Plaintiff should bear half of any losses there might be in respect of any of the transactions, and generally he was to receive and bear one-half of the profits and losses upon the whole of the transactions. Such language is a very strong feature in favour of a partnership; and stopping there, it is plain that it was a contract between the parties under which they were to share equally the profits and losses. But next come the words, "but this agreement is not in any way to be construed into a partnership between us, and only and solely to relate to the above estate." Now, as to that stipulation between the parties, if the words "only and solely relate to the above estate" had been left out, there would not, I think, have been a partnership. The words would however be unmeaning if a partnership be negatived by the use of them. I read this agreement as a partnership only and solely relating to the above estate, and not as a general partnership.

Next I find the words that the Plaintiff was not to charge the Defendant's credit in respect of the estate without his written

(1) 3 Mac. & G. 250.

V.-C. H. 1879 MOORE v. DAVIS.

consent. Now, if there was not a partnership there could be no fear of the Plaintiff charging the credit of the Defendant; for of course he could not have done that. This clause, therefore, seems to suppose the existence of a partnership between the parties. The Defendant in effect said, "I, as managing partner, will keep this matter under my own control, but if I give my consent you will be able to charge my credit." Then in regard to the vouchers, which the Plaintiff was not to question or require to any account that the Defendant might render, that was only a mode of making out the accounts, and was as consistent with there being a partnership as with there not being one. And the clause suggests, too, that there might be some payments out of the Plaintiff's own pocket, but unless he was to be a partner it would be a most unusual thing to advance money in that way.

Upon the whole, then, it seems to me that this was property which the parties contracted should be realized for their mutual benefit, and as to which certain payments were to be made; and although the parties said that there was not to be a partnership between them, yet the agreement must be construed as constituting one; and if that is not a proper construction of the language, still I hold that it was an agreement which in itself involved a partnership in law notwithstanding the words used. Therefore, the parties being partners, there must be a declaration for a dissolution as prayed for, and accounts and inquiries taken and made; but there will not be any costs up to and including the hearing of the action.

Solicitors: *G. T. Powell; W. J. Foster.*

In re WILFORD'S ESTATE.
TAYLOR *v.* TAYLOR.

[1878 W. 241.]

V.-C. H.
1879
Feb. 15.

Gift to Sisters as Joint Tenants—Agreement to dispose of Property by Wills—Severance of Joint Tenancy.

Leasehold property was given by will to two sisters as joint tenants, and they mutually agreed to bequeath it in trust for each other for life, and for their nieces after the death of the survivor. One sister having died, the survivor made a will giving the property in a different manner:—

Held, that the agreement between the sisters, carried out by the making of the wills, severed the joint tenancy, and that the property must be administered on the footing of a tenancy in common.

TWO sisters, *C. E. Wilford* and *H. J. Wilford*, resided together, and they were, with other property, entitled, as joint tenants under the will of Mrs. *Clarke*, to certain leasehold houses. The solicitors, who acted for the sisters in matters of business, did not keep separate accounts of the moneys which belonged to each, as they had a joint purse. In 1866 some of the leasehold houses were sold, and the moneys received were, with other moneys contributed by the sisters, lent upon mortgage on their joint account. The loan was paid off in January, 1877, to *H. J. Wilford*.

On the 5th of June, 1861, the sisters made their wills, and thereby each gave her property to the other absolutely, and appointed her sole executrix.

On the 10th of September, 1872, each sister made a will giving her real and personal estate to the other for life, and after her death subject to certain legacies to certain nieces in equal shares, the terms of the will being indentical except in the interchange of the donees for life.

Mr. *Taylor*, a nephew, and one of the trustees named in both wills, deposed that he, on the 22nd of August, was present with his aunts by appointment, and that they stated that it was the intention of each of them to make a will in favour of the other, so that the survivor should have the whole of the property which had been bequeathed to them by Mrs. *Clarke*, *i.e.*, they

V.-C. H. 1879 — *In re* Wilford's Estate. Taylor *v.* Taylor.

agreed to divide it equally between them in this way: that the survivor should have the income for life, and that after her decease the property should go to certain persons to whom they had agreed it should be bequeathed; that that understanding was definitely arranged by them in his presence, and that at another interview on the 11th of September, 1872, they told him that each had made a will to carry out the arrangement. After the death of *C. E. Wilford*, which occured on the 17th of November, 1873, *H. J. Wilford* made a will on the 1st of March, 1876, and disposed of her property in a manner different from the bequest in her will of 1872, and thereby she gave it to the children of her nephew, *F. Taylor*, who should be living at her death, in equal shares. *H. J. Wilford* having died, an action was brought for the administration of the estate of *C. E. Wilford*. Judgment was given in the action in July, 1878, and certain accounts and inquiries ordered to be taken and made. Two of the residuary legatees under the will of *H. J. Wilford* had obtained leave to attend the proceedings in the action, and on their behalf it was contended that *H. J. Wilford* became absolutely entitled as survivor to her sister's moiety of the property under Mrs. *Clarke's* will, on the ground that there had been no severance of the joint tenancy in it by the transactions which had taken place.

This was a summons taken out by the Plaintiffs, asking that the accounts and inquiries might be taken and made on the footing that there had been a severance of the joint tenancy in the property.

Eddis, Q.C., and *A. C. Eddis*, for the Plaintiffs, submitted that there had been by the transactions and conduct of the sisters, and the making of their wills, sufficient done to effect a severance of the joint tenancy. They referred to *Williams* v. *Hensman* (1); *Gould* v. *Kemp* (2); *Harrison* v. *Barton* (3); *Robinson* v. *Preston* (4).

Hastings, Q.C., and *Gregory*, for the residuary legatees, who had obtained leave to attend the proceedings, referred to *Crooke* v. *De Vandes* (5).

(1) 1 J. & H. 546.
(2) 2 My. & K. 304.
(3) 1 J. & H. 287.
(4) 4 K. & J. 505.
(5) 11 Ves. 330.

Morshead, for the trustees.

HALL, V.C.:—

I am of opinion that there was a severance of the joint tenancy in this property by the transaction which *H. J. Wilford* carried out with her sister in 1872. The case is a peculiar one, no case that I am aware of having occurred before in which the question has arisen from a transaction like this. The joint tenants agreed to make mutual wills. Before that they made wills by which they gave their property to each other absolutely, but in 1872 they agreed to make wills under which the survivor should take the property for her life only, and after her decease that it should be held for the benefit of certain nieces of each of them. That agreement, which was a dealing by each of the sisters with her moiety of the joint property is proved by Mr. *Taylor's* evidence. It was acted upon by both sisters, their wills being made in accordance with it, and it effected, in my opinion, a severance of the joint tenancy. It would be a monstrous thing to hold, after the agreement had been so far perfected, that after the death of one sister the other could claim the joint property as belonging absolutely to her as survivor. There appears to me to be ample evidence of the agreement and of part performance of it, and I hold that the parties who claim under the will of *C. E. Wilford* are entitled to have the property administered, on the footing that the transactions of the sisters created a tenancy in common.

Solicitors: *Poole & Hughes; Hanbury, Hutton, & Whitting.*

FRY, J.

1879

Feb. 28.

In re BALL'S TRUST.

Settlement—Child—Die without having been Married.

By a marriage settlement the trust funds were, in the event of the husband surviving, to go as if the wife had died without having been married. She died, leaving her husband and one child surviving :—

Held, that the trust funds went to the child.

BY a settlement dated the 20th of October, 1875, and made on the marriage of *Louisa Margaret Holland* (afterwards *Louisa Margaret Ball*) with *Thomas Ball*, certain securities were transferred to trustees on trust to pay the income thereof to *Louisa Margaret Ball* during her life, and after her death, if she should survive *Thomas Ball*, in trust for herself, but if *Thomas Ball* should survive her, then upon such trusts and for such persons as the said *Louisa Margaret Ball* should, notwithstanding coverture, by will or codicil appoint, and in default of appointment "in trust for such persons or person as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the said *Louisa Margaret Holland* had she died possessed thereof intestate and without having been married, such persons, if more than one, to take as tenants in common in the shares in which they would have been entitled under the same statutes." *Louisa Margaret Ball* died in August, 1876, without having exercised her power of appointment, leaving her husband and one child of the marriage, *Louisa Mary Ball*, her surviving. The securities comprised in the settlement were sold, and the trust fund, £1008, was paid into Court under the *Trustee Relief Act*.

Louisa Mary Ball, the child, presented a petition to have the money invested and carried to her account.

J. Pearson, Q.C., and *W. W. Karslake*, in support of the petition :—

No doubt there is a difficulty, as the Petitioner is the child of Mrs. *Ball*, and if she had died without having been married she could not have had a child, but the decisions on similar words are conclusive : *Re Norman's Trust* (1) ; *Wilson* v. *Atkinson* (2) ; and the child is not excluded.

(1) 3 D. M. & G. 965. (2) 4 D. J. & S. 455.

Bristowe, Q.C., and *H. A. Giffard*, for the next of kin of Mrs. *Ball*:—

The testatrix had an absolute power of appointment, and she has not chosen to exercise it in favour of her child. There is no mention of children in the settlement, and no indication that they were to take anything under it, and there is nothing to control the literal meaning of the words. *Smith* v. *Smith* (1) and the opinion of Lord *Wensleydale* in *Clarke* v. *Colls* (2) are in favour of the next of kin.

Northmore Lawrence, for the trustees.

Higgins, Q.C., and *Lemon*, for other parties.

FRY, J.:—

In this case if there had been no authority I should have had considerable difficulty in holding that the child was entitled to the fund, because if the mother had never been married she could never have had a child capable of taking. But the case appears to be covered by the decision in *Wilson* v. *Atkinson* (3), which is in substance the same as the case now before me, the exception being that it contained the declaration as to the illegitimate child. The Lords Justices there gave two reasons for their decision: one was that there was an express declaration as to the illegitimate daughter, which must have some meaning given to it; but independently of that declaration, both the learned Judges held that the words "next of kin" would not be construed so as to exclude a child; in other words, that under a limitation like this a child may claim as statutory next of kin of the mother. It appears to me that I am bound by the decision of the Court of Appeal; and I must decide in favour of the child and make a declaration accordingly.

Solicitors for Petitioners: *Crosley & Burn.*
Solicitor for Next of Kin: *A. H. Miller.*
Solicitor for Trustees: *J. Mote.*

(1) 12 Sim. 317. (2) 9 H. L. C. 601.
(3) 4 D. J. & S. 455.

FRY, J.
1879
Feb. 28.

In re ROPER'S TRUSTS.

Infants—Maintenance—Discretion—Income.

Where a fund was by will given to trustees for infants, and the trustees were desired to pay the income to the mother to be by her applied for their benefit at her discretion:—

Held, that the Court had power, where the mother had not exercised a sound discretion, to order the income to be paid to the father for the maintenance of the infants.

W. J. ROPER, who died in 1875, by his will gave to trustees £1000 upon trust for the three children of his niece *Fanny Keech*, in equal shares, to be paid to them respectively as and when they respectively attained the age of twenty-two years. And the testator declared that his trustees should be at liberty to apply the income of any for the time being expectant though not actually vested legacy or share of any expectant legacy of the several legatees under that his will where not by him otherwise directed for and towards his or her maintenance, education, and general benefit, with liberty to pay the same to the father, mother, or guardians, or any guardian of any such legatee pending the absolute vesting of any legacy for the purposes aforesaid without being liable to see to the application thereof, "and in particular I desire my trustees to pay to my niece the said *Fanny*, otherwise *Frances Keech*, the income derivable from the firstly hereinbefore mentioned legacy by me bequeathed to or upon trust for her children to be by her applied for their benefit at her discretion."

The trustees of the will transferred into Court £1078 Reduced £3 per Cent Annuities, representing the above-mentioned legacy, and the three children, who were infants, now presented a petition by their father *Ezekiel Keech*, their next friend, for payment to him of the dividends on this sum for their maintenance. It appeared that *Ezekiel Keech* and *Fanny Keech* had for some time been living apart, and evidence was adduced as to the conduct of *Fanny Keech*, and that the children were being maintained by *Ezekiel Keech*.

FRY, J.
1879
In re ROPER'S TRUSTS.

Glasse, Q.C., and *Northmore Lawrence*, for the Petitioners:—

The direction to pay the income is not absolute, and where a discretion is left the Court will control that discretion: *In re Hodges* (1).

Locock Webb, Q.C., and *Brabant*, for *Fanny Keech*, contended that no case had been made for taking away this income from her even if the Court had power to do so. But the direction to pay it to her was absolute: *Lyons* v. *Blenken* (2).

Jolliffe, for the Trustees.

FRY, J.:—

The sole question for present decision is, whether I have power to exercise any control over this fund. I think that *Fanny Keech* has not exercised a sound discretion; and that where the Court finds such to be the case, though the income is by the words of the will left to the discretion of a given person, the Court has power to control that discretion and to deal with the income. The petition must therefore be referred to Chambers.

Solicitors for Petitioners: *Gregory & Co.*
Solicitor for Wife: *F. A. Brabant.*

TAITE *v.* GOSLING.

FRY, J.
1879
Feb. 26;
March 4.

[1878 T. 114.]

Injunction—Covenant—"Assign"—Lessee of Covenantee.

Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach.

AN estate known as the *Dulwich* estate was sold by auction in 1868 by the *British Land Company*, and *William Harris* purchased Lot 249 at the said sale.

(1) 7 Ch. D. 754. (2) Jac. 245.

FRY, J.
1879
TAITE
v.
GOSLING.

By an indenture of conveyance dated the 19th of July, 1873, the *British Land Company* conveyed to *William Harris* for valuable consideration the said Lot 249, and the conveyance contained the following recital and covenant:—

"Whereas the premises were sold to the purchaser subject to the stipulations specified in the second schedule, Now therefore the vendors, for themselves and their assigns, and the purchaser for himself, his heirs, executors, administrators, and assigns, do respectively covenant and grant with and to each other, and as to the purchaser also with and to the owners or owner of any other land to which the benefit of the said stipulations is attached, and their, his, or her respective heirs and assigns, that the covenantors respectively and their respective heirs and assigns will henceforth observe, perform, and comply with the said stipulations so far as the same relate either to the rights or to the duties of the purchaser, his heirs or assigns, in respect of the land hereby conveyed; and that nothing shall ever be erected, fixed, placed, or done upon the land as to which they respectively covenant in breach or violation or contrary to the fair meaning of the said stipulations; but this covenant is not to be held personally binding upon either the vendors or the purchaser, or any other person, except in respect of breaches committed or continued during their, his, or her joint or sole seisin of or title to the land upon or in respect of which such breaches shall have been committed."

The 2nd schedule referred to in the above-stated clause contained the following stipulations with respect to Lots 220 to 262: "The trade of an innkeeper, victualler, or retailer of wine, spirits, or beer, is not to be carried on upon any lot.

"The conveyance of each lot shall contain covenants to observe the above stipulations, with a proviso limiting the liability of each covenantor to the period of ownership. The covenant by the purchaser shall be (in respect of the lot or lots conveyed to him) with the vendors and the other owners for the time being of the others of Lots 220 to 262."

By a subsequent indenture the *British Land Company* conveyed to *Emma Hard*, widow, other parcels of land included in the said Lots 220 to 262, and this conveyance contained recitals, stipula-

tions, and covenants identical with those contained in the indenture of the 19th of July, 1873.

The Plaintiff, *Frank Taite*, was lessee for ninety-nine years, under *Emma Hard*, of the parcels of land so purchased by her, and he claimed to restrain the Defendant, who purchased Lot 249 from *Harris* in 1875, from carrying on the trade of a retailer of wine, spirits, or beer, in breach of his covenant.

North, Q.C., and *H. Fellows*, for the Plaintiff:—

The Plaintiff as a lessee, and so an assign of *Emma Hard*, is entitled to sue on this covenant: *Wright* v. *Burroughes* (1). The lessee of a person bound by such a covenant may be sued: *Johnstone* v. *Hall* (2); *Wilson* v. *Hart* (3); *Fielden* v. *Slater* (4). And so such a lessee must have a corresponding right to enforce the covenant. *Tulk* v. *Moxhay* (5) shews that a person taking the land with notice of the covenant can be sued for a breach, even though the covenant does not run with the land.

Cookson, Q.C., and *Cozens-Hardy*, for the Defendant:—

The Plaintiff, being only a lessee for years, is not an assign of *Emma Hard* within the meaning of the covenant. Only the owner of a freehold estate in the property can sue to restrain a breach of the covenant. If a lessee for years can sue, so can his underlessee, and any person having the smallest possible interest in any lot.

That the meaning of the word "assign" must be one who has become entitled to the original owner's whole interest is shewn by the rule of law, that a covenant in a lease not to assign is held not to be broken by an underlease.

It may be that an assignee of any part of the freehold would be entitled to maintain this action, because the law, with its reminiscences of feudal notions, attaches a virtue to the ownership of any freehold interest in land, but with this exception, no person can sue as an assign who does not exhaust the whole of the assignor's interest.

(1) 3 C. B. 685.
(2) 2 K. & J. 414.
(3) Law Rep. 1 Ch. 463.
(4) Ibid. 7 Eq. 523.
(5) 2 Ph. 774.

FRY, J.
, 1879
TAITE
v.
GOSLING.

[FRY, J.:—It is laid down in 1 Inst. 215 a, and in *Wynter's Case*, there cited, that the grantee of the reversion may take advantage of conditions, and in *Kidwelly* v. *Brand* (1) that an assignee of part of the reversion is an assignee within statute 32 Hen. 8, c. 34, which gave assignees from the monasteries and other persons the same rights as against lessees as their predecessors in title had.]

That may be so under the statute, which was founded upon tenure and obligation and the rights of landlord over tenant—and being a statute in favour of the Crown has been construed beneficially—so that the decisions under it ought not to be applied in a case like the present.

The words of the covenant in this case all point to ownership of the freehold—"seisin," "owner," "heirs," are the words used. The word "owner" in the *Lands Clauses Act* is interpreted to mean "owner in fee."

Wright v. *Burroughes* (2) was a case upon the statute. The Defendant is not a lessee of the Plaintiff, but a perfect stranger to him: *Thomas* v. *Hayward* (3).

The cases of *Johnstone* v. *Hall* (4), *Wilson* v. *Hart* (5), *Fielden* v. *Slater* (6) and *Tulk* v. *Moxhay* (7), were not decisions on the meaning of the word "assigns"; in some of them the word was not used, but they merely decided that whoever takes the land with notice of the covenants is liable to be sued on them.

This is an attempt to take those cases which relate to the persons who may be sued, and apply them to the person who may sue.

[*Fairclough* v. *Marshall* (8) was also referred to.]

March 4. FRY, J., having taken time to look into the cases, said:—

The only defence which has been urged in this case is that the Plaintiff, being only a lessee for years, was not an assign of the

(1) Plowd. 72.
(2) 3 C. B. 685.
(3) Law Rep. 4 Ex. 311.
(4) 2 K. & J. 414.
(5) Law Rep. 1 Ch. 463.
(6) Ibid. 7 Eq. 523.
(7) 2 Ph. 774.
(8) 4 Ex. D. 37.

2 Jur. N.S. 780

owner within the meaning of the covenant, so as to entitle him to sue. I expressed a strong opinion at the hearing that this defence could not be sustained, and after further consideration I have no hesitation in deciding that the Plaintiff is clearly an assign, and is entitled to sue. The word "assign" used in such a case as this includes a lessee in ordinary legal language, and no sufficient reason has been produced to shew that it ought not to have a similarly wide meaning here. Mr. *Cookson* urged that an assign in such a covenant as this must be one who takes the owner's whole estate, or at any rate a freehold estate in the land, but the authorities are against this conclusion, for in one of the earliest cases upon the statute 32 Hen. 8, c. 34, which gave the benefit of covenants to persons claiming under the covenantee, and therefore is in *pari materiâ* with the case before me, it was held that an assignee of part of the reversion might sue under the statute. That was laid down in *Kidwelly's* case (1), although the point does not appear to have been argued, and in the passage from Lord *Coke* to which I referred during the argument. The case of *Wright* v. *Burroughes* (2), cited for the Plaintiff, is a clear authority for the wider interpretation of the word "assign" so as to include a lessee, in cases under the statute; and the principle of interpretation ought not to be confined to cases under the statute, but may reasonably be applied to other cases of covenants where the assignees are to have the same benefit as the covenantees had. It is true that underletting is not considered an assignment of a lease, so as to be a breach of a covenant not to assign, but that is because the verb "assign" as applied to leasehold property has the technical meaning of assigning the whole interest, while the word "assign" as used in the expression "heirs and assigns," has not been confined to a person taking by an assignment exhausting the whole interest. Judgment must accordingly be for the Plaintiff.

Solicitors for Plaintiff: *Ravenscroft, Hills, & Woodward.*
Solicitors for Defendant: *Digby & Tabor.*

(1) Plowd. 72.

(2) 3 C. B. 685.

C. J. B.
1879
Jan. 14.

Ex parte HIRST. *In re* WHERLY.

Bankruptcy—Jurisdiction—Liquidation—Debtor Mortgagor—Action by Equitable Second Mortgagees for Redemption and Foreclosure—Order in Bankruptcy restraining the Action, discharged.

An equitable second mortgagee commenced an action against the liquidation trustee of the mortgagor, and the first mortgagees, claiming an equitable charge on the property, redemption against the second mortgagees, and, if necessary, foreclosure.

Order of County Court in bankruptcy, restraining the action, discharged.

THIS was an appeal from the County Court at *Newcastle.*

In May, 1877, the debtor, *Silvestor Gregory Wherly*, of *Newcastle* and *Tynemouth*, commission agent, asked the Appellants, *Hirst & Son*, contractors and builders of *Sunderland*, to tender for building three houses for him in *Hotspur Street, Tynemouth;* and on the 9th of May, the *Hirsts* tendered to build the houses (except certain specified fixtures to be found by *Wherly*, but which they would fix) for £1660. On the 12th of May the tender was accepted by *Wherly*. Payment was to be made in four instalments of £300, £300, £500, and £560. Inquiry having been made by the *Hirsts* for security, *Wherly* wrote to the solicitor of the *Tynemouth Permanent Building Society* the following letter:—

"19, *Saville St., North Shields,*
"11 June, 1877.

"Dear Sir,—I have arranged with Messrs. *Hirst & Sons*, of *Sunderland*, to build me three houses at *Tynemouth*, which I intend mortgaging to the building society for about £600 each, and I hereby authorize you to hand over the advances which may from time to time be made by the society, to the contractor, until the price of their contract is complete. I have promised them not to transfer any of the houses from the building society to any purchaser without handing over to them the difference between price of their contract and amount advanced by the society.

"Yours truly,
"*Silvestor G. Wherly.*

"Mr. *J. W. Fenwick.*"

C. J. B.
1879
Ex parte HIRST.
In re WHERLY.

On the 13th of June Mr. *Fenwick*, the solicitor, wrote as follows:—

"19, *Saville St., North Shields,*
"13 June, 1877.

"Gentlemen,

"*Re Wherly—Hotspur St. Houses.*

"In accordance with the arrangement made yesterday afternoon, I promise to hand over to you all moneys I receive from the building society on account of these houses, until your contract price is paid you, £533 6*s.* 8*d.* each house.

"Yours truly.
"p.p. *John William Fenwick,*
"p.p. *Frederick B. Fenwick.*

"Messrs. *Hirst & Sons.*"

On the 24th of July, 1877, Messrs. *Hirst* claimed the first instalment of £300. On the 3rd of August Mr. *Fenwick* sent to Messrs. *Hirst* £250 on account of the houses, with a letter in which he said he sent the cheque "at the request of Mr. *S. G. Wherly.*"

On the 17th of August, 1877, Messrs. *Hirst* wrote to *Wherly* to say that the roofs of the houses would be on in the early part of the following week, and that they would then require an advance of £350.

By three indentures dated respectively the 15th of September, 1877, and made between *S. G. Wherly* of the one part, and three trustees of the building society of the other part, in consideration of £510, in each deed expressed to be paid to *S. G. Wherly*, each of the three houses was conveyed to the trustees for securing the repayment of £510 and interest.

No part of this £1530 reached the hands of *Wherly.*

Shortly before the 21st of September, 1877, the building society advanced £200 to Messrs. *Hirst.* On the 2nd of October Mr. *Fenwick* sent them another cheque for £150; and on the 26th of November another for £360.

After repeated applications, the directors of the society resolved in February, 1878, to advance a further sum of £500 to Messrs. *Hirst*, but the payment was never made.

On the 2nd of March, 1878, *S. G. Wherly* filed a liquidation petition, under which *James Mallett* was appointed receiver and trustee.

C. J. B. 1879 *Ex parte* HIRST. *In re* WHERLY.

A letter of the 4th of March, addressed by *Wherly* to the Messrs. *Hirst*, contained the following expressions:—"I have seen young Mr. *Fenwick*. Both he and Mr. *Mallett*, the receiver, think the place ought to be finished; so that if you get money from society, it will not make any difference to you. I am sorry that society has been so badly off for coin, which of course I could not help. I have always done my best to influence the many payments to you, and I trust that by calm judgment the houses will be finished. You are sure of your money, and the receiver will do what he can."

On the 28th of March Messrs. *Hirst* served notices on the trustees of the building society and on their solicitor, demanding payment to them "in accordance with the order of the said *Silvestor Gregory Wherly* to your solicitor, dated 11th day of June, 1877, and the acceptance thereof by such solicitor dated 13th day of the same month of June, and upon the faith of which we have built the three houses therein referred to, and in respect of which you have made various payments, of all moneys now due and owing from you under or by virtue of" the three deeds of the 15th of September, 1877, whereby the houses were conveyed to the trustees for securing to them "the repayment of the moneys therein expressed to have been paid to the said *Silvestor Gregory Wherly*, but which became payable to us by virtue of his accepted order as aforesaid."

On the 6th of August, 1878, the Messrs. *Hirst* commenced an action against the liquidation trustee and the trustees of the building society for the purpose of establishing an equitable charge on the three houses. The writ was specially indorsed with the following (abridged) particulars:—A declaration that the Plaintiffs were entitled to an equitable charge upon the houses for the unpaid balance of their contract price for building the houses, less the cost for fixing the fixtures above mentioned; redemption as against the building society trustees as mortgagees under the deeds of September, 1877; payment by the liquidation trustee of the moneys owing on the equitable charge and the three mortgages respectively, and costs; in default, foreclosure against the liquidation trustee; an injunction; a receiver; accounts and inquiries; and further relief.

The action was registered as a *lis pendens*.

On the 15th of August an order was made in the County Court, on the application of the liquidation trustee, that Messrs. *Hirst* be restrained from taking further proceedings under the writ of summons; and from taking further proceedings under a notice of motion for an injunction; and that the registration of the action as a *lis pendens* be vacated, the trustee undertaking in damages.

In an affidavit in support of the last-mentioned application, *Wherly* said he was advised and believed that the promise contained in the letter of the 11th of June, 1877, did not amount to a charge on the property, and that the entry of the names of *Hirst & Son* in the list of secured creditors on his estate was an act of inadvertence on his part, and not intended to refer to any lien or charge in their favour. The trustee, in an affidavit, said he was informed and believed that no such equitable charge existed.

On the 2nd of November an order was made by the Judge of the County Court that the restraining order of the 15th of August, 1878, be made absolute.

This was the order appealed from.

De Gex, Q.C., and *Robert Wood Ingham*, for the Appellants:—

The right of a mortgagee in equity to proceed in Chancery against the liquidation trustee of the equitable mortgagor is not taken away by the *Bankruptcy Act*, 1869: *White* v. *Simmons* (1); *Ellis* v. *Silber* (2); *Ex parte Pannell* (3).

Ex parte Dickin (4) decides that the Court of Bankruptcy ought not to enforce a simple money demand, which in that instance was made by the trustee of a bankrupt against a third party. In the course of his judgment in that case the Master of the Rolls said (5), "It never could, I think, have been the intention of the Legislature that the Court of Bankruptcy should exercise a jurisdiction to decide the title to any real estate in the country which was claimed by a man who happened to be a bankrupt."

We cannot redeem the building society in this Court, because we cannot bring the building society here.

(1) Law Rep. 6 Ch. 555.
(2) Ibid. 8 Ch. 83.
(3) 6 Ch. D. 335.
(4) 8 Ch. D. 377.
(5) 8 Ch. D. 386.

C. J. B. 1879 *Ex parte* HIRST. *In re* WHERLY.

In *Waddell* v. *Toleman* (1), *Fry*, J., overruled an objection taken by a Defendant who was trustee in bankruptcy of a mortgagor, and who contended that the Plaintiff, a trustee in bankruptcy of the mortgagee, ought to have applied in bankruptcy.

It is at least doubtful whether the Court of Bankruptcy has any jurisdiction to make an order for foreclosure: *Ex parte Fletcher* (2).

Winslow, Q.C., and *E. Cooper Willis*, for the trustee:—

The non-exercise of jurisdiction by the Court of Bankruptcy is discretionary only. *Ex parte Fletcher* does, in effect, establish this. The Court will not interfere with the discretion, properly exercised, of a Judge of a County Court, who, at the instance of a liquidation trustee sees good ground for staying proceedings in Chancery. What the County Court decided was in substance this, that the Plaintiff's claim was altogether unsubstantial and groundless.

White v. *Simmons* (3) was merely a decision as to whether a demurrer would lie. Lord *Hatherley*, C., overruled the demurrer, on the ground that the Plaintiff, the mortgagee, was not compelled to go into the Court of Bankruptcy for his remedy.

The decision of *Fry*, J., in *Waddell* v. *Toleman*, merely goes to this, that the Plaintiff has an alternative remedy.

The Appellants are, in substance, attempting to oust the jurisdiction expressly given to this Court by sect. 72 of the *Bankruptcy Act*, 1869.

BACON, C.J., after referring to Lord *Loughborough's* Order of the 8th of March, 1794 (4), continued:—

The course prescribed by that order has been very often adopted. But it has also happened that a mortgagee, whose security is equitable only, has filed a bill to realize his security, and

(1) 9 Ch. D. 212.
(2) Ibid. 381.
(3) Law Rep. 6 Ch. 555.
(4) This order will be found printed at length in *Cooke* on the Bankrupt Laws, Ed. of 1823, vol. ii. pp. 266, 269. It was superseded by Rules LV.–LVIII. of the *Bankrupt Law Consolidation Act* of 1849 (12 & 13 Vict. c. 106); and for these were substituted rules 78 to 81 of the *Bankruptcy Act*, 1869, (32 & 33 Vict. c. 71).

that to such a bill an assignee in bankruptcy has been made a party. That has been the constant practice.

Now the 72nd section of the *Bankruptcy Act*, 1869, is a very valuable section. It enacts that the Court of Bankruptcy shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within its cognizance. In the course of this discussion I asked myself whether the question in this case is a question which can be said to "arise in" the bankruptcy. The answer does not seem to me to be in the affirmative. The applicant in this instance is mortgagee in the second degree. What is the right of such a person? His right is to redeem the first mortgagee, and if necessary, to foreclose the mortgagor. He has a right to bring the first mortgagee before the Court, and he cannot exercise that right by any proceeding that I am aware of, except by a proceeding in the Chancery jurisdiction. I do not know of any mode by which such a remedy as this can be enforced in bankruptcy; if I did, I should not hesitate to adopt it.

In deciding this I do not say one word as to what may be the validity of the equitable mortgage. All I say is, that the equitable mortgagee has a clear right to bring his action; and that this Court has no authority to restrain the Plaintiff in that action from suing the trustee in bankruptcy and the building society in order to establish his right to redeem and foreclose, if he can.

It has been said that this is an attempt to oust the jurisdiction. I cannot attend to that suggestion. The Plaintiff has a right to bring his action; if he fails, he will fail with the usual penalty of paying all the costs of his proceeding. He has a right to come into the Court of Bankruptcy under the principle of Lord *Loughborough's* Order, or to bring an action, which will be equivalent to filing a bill in Chancery. It may be that his security is insufficient, but with that I have nothing to do.

The order of the Court below must be discharged, with costs both here and in the Court below.

Solicitors: *John Tucker*, agent for *Snaton Hall, Sunderland; Pattison, Wigg, & Co.*, agents for *Chartres, Youll, & Wilkinson, Newcastle.*

ALISON, *Re.* (1879) (11 Ch.D. 284; 40 L.T. 234). *Distinguished.* YOUNG *v.* CLAREY .. .. .. [1948] 1 All E.R. 197

TRUSTS. YOUNG *v.* CLAREY. [1948] 1 Ch. 191

C. A.
1879
V.-C. M.
Feb. 1, 8.

C. A.
March 12.

In re ALISON.
JOHNSON *v.* MOUNSEY.

[1877 A. 145.]

Mortgage—Trust for Sale—Sale under Trust—Surplus Moneys—Mortgagee in Possession—Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *ss.* 25, 28.

A security for money lent was made in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than twenty years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount then due for principal, interest, and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited :—

Held (by *Malins*, V.C., and by the Court of Appeal), that such a security is simply a mortgage; also that a mortgagee who has been in possession for more than twenty years may make a title and convey under his power of sale.

Held (by the Court of Appeal, reversing the decision of *Malins*, V.C.), that the devisees in trust could only convey as owners in fee, and that the mortgagors had no right to the surplus of the purchase-money.

Locking v. *Parker* (1) explained.

BY an indenture of mortgage dated the 10th of October, 1827, *Sophia Stringer*, *Anne Stringer*, and *Phœbe Stringer*, in consideration of £3000 paid to them, conveyed to *Richard Alison* and his heirs certain pieces of land in *Liverpool* "Upon trust that he the said *Richard Alison*, his heirs or assigns, shall or may so soon as he or they shall think fit, without the concurrence of or any further power or authority from the said *Sophia Stringer*, *Anne Stringer*, and *Phœbe Stringer*, their or either of their heirs or assigns, than is hereby given, sell and dispose of, either by public auction or private contract, either together or in separate lots, or at one or at different times, as he or they shall think fit, all and singular the said pieces or parcels of land," to any person or persons willing to purchase the same or to lend any sum of money thereupon; and it was declared that the said *Richard Alison*, his heirs, executors, administrators, and assigns, should apply and dispose of the money to be raised or arise by such sale or mortgage, in the first place in the payment of expenses and outgoings as

(1) Law Rep. 8 Ch. 30.

therein mentioned, and in the next place should pay or retain the said sum of £3000 and interest thereon; and should pay or apply the residue or surplus (if any) of the money to arise by such sale or mortgage, or sales or mortgages, and reconvey and assure, at the request, costs, and expenses of the said *Sophia Stringer*, *Anne Stringer*, and *Phœbe Stringer*, their or some or one of their heirs or assigns, such part or parts of the same pieces or parcels of land as should then remain unsold and undisposed of unto the said *Sophia Stringer*, *Anne Stringer*, and *Phœbe Stringer*, their heirs and assigns, or as they should lawfully direct or require. In 1828 a further sum of £500 was advanced by *Richard Alison*, and was charged on the same pieces of land. The mortgagors afterwards made second mortgages of the same pieces of land to *Esther Mills* by way of security for £500.

In the year 1849 *Richard Alison* entered into possession of the mortgaged pieces of land, and he and his devisees continued in possession until the sale hereinafter mentioned. He died in August, 1874, having by his will devised his estate, including these lands, to *E. Mounsey*, *W. W. Doke*, and *James Haughton* (since deceased), on trust for two infants. He appointed his trustees executors of his will, and his estate was stated to exceed £400,000 in value.

In 1876 the trustees of the will agreed to sell these lands to the Corporation of *Liverpool* for £5450; and by an indenture dated the 20th of September, 1876, and made between *Mounsey* and *Doke*, the surviving trustees of *Alison's* will, of the one part, and the mayor, aldermen, and burgesses of *Liverpool*, of the other part, after reciting the mortgage deed of 1827, and the further charge of 1828, and the will and death of *Alison*, the indenture proceeded: "And whereas pursuant to the said powers for this purpose contained in the said indenture and in the said will, the said *Edward Mounsey* and *W. W. Doke* have agreed with the Corporation for the absolute sale to them of the hereditaments intended to be hereby granted and the inheritance thereof in fee simple in possession, free from incumbrances, at the price of £5450, Now this indenture witnesseth, that for effectuating the said sale, and in consideration of the sum of £5450 to the said *E. Mounsey* and *W. W. Doke*, paid by the Corporation . . . . They the said

C. A. 1879 *In re* ALISON. JOHNSON *v.* MOUNSEY.

E. Mounsey and *W. W. Doke* do and each of them doth hereby grant and convey and assure unto the Corporation, their successors and assigns, all that, &c." (giving a description of the lands conveyed, which were the same as those comprised in the deed of 1827), "to have and to hold the same unto and to the use of the Corporation absolutely discharged from the said mortgage debts of £3000 and £500, and all interest for the same, and all claims and demands on account thereof."

A suit had been instituted for the administration of the estate of *R. Alison*, and a claim was made by summons in the suit by the representatives of the second mortgagee and by the survivor of the mortgagors, to the surplus of the purchase-money in the hands of the trustees of *Alison's* will. It appeared that *Alison* had always kept the accounts of this estate as a mortgagee in possession, and that the rents had nearly balanced the outgoings and interest, so that at the time of the sale a very small balance of interest was due to his representatives. It further appeared that a Mr. *Douglas*, who was the solicitor of the surviving Miss *Stringer*, had in the course of the negotiations preceding the sale to the corporation been consulted by *Mounsey*, who was an accountant and agent in partnership with one *Lewis*, as to the price to be asked, and other matters; and according to *Douglas's* statement he had been led to believe that he would be paid the surplus of the purchase-money.

The Chief Clerk of Vice-Chancellor *Malins* found that the second mortgagees and the surviving mortgagor were entitled to the surplus of the purchase-money.

The legatees under *Alison's* will took out a summons before Vice-Chancellor *Malins* to vary the Chief Clerk's certificate. The summons came on for hearing on the 1st of February, 1879.

Glasse, Q.C., *Snow*, and *Oswald*, for the legatees under *Alison's* will:—

The mortgagee had been in possession of the estate for much more than thirty years, and had become absolute owner under 3 & 4 Will. 4, c. 27, s. 28: *Dawkins* v. *Lord Penrhyn* (1). His trustees sold as absolute owners, though in their conveyance they

(1) 6 Ch. D. 318.

recited as the origin of their title the mortgage deed. That, however, was no acknowledgment to the mortgagor: *Lucas* v. *Dennison* (1); *Batchelor* v. *Middleton* (2). The law is not now as it was when *Trulock* v. *Robey* (3) was decided. No doubt this security was taken in the form of a trust, as was usual in the early part of the century, but that has been decided to make no difference: *Locking* v. *Parker* (4). In 1875 the rights of the mortgagor were absolutely barred, and nothing since done has revived or could revive them. The vendors were merely trustees under *Alison's* will, and no declaration of theirs could take the money away from his estate.

Bristowe, Q.C., and *Warmington*, appeared for the trustees of *Alison's* will, and referred the Court to *Richardson* v. *Younge* (5) as to the effect of an acknowledgment by one of two trustees.

Higgins, Q.C., and *H. P. Lawrence*, for the representatives of the second mortgagee and for the surviving mortgagor:—

Our first contention is that this security created an express trust for the mortgagors which is excepted and is not barred by the statute. Secondly: The second mortgagees are assignees of the surplus, and gave notice of their assignment. As to the first point, no doubt the mortgagors could not come here to redeem, as in the cases cited; but this is not a redemption, it is merely an application to the Court by a *cestui que trust* for money in Court. The latter part of the judgment in *Locking* v. *Parker* is entirely in favour of the mortgagors. So is the passage in the judgment of Vice-Chancellor *Wood* in *Kirkwood* v. *Thompson* (6). The mortgagors could not force the mortgagee to sell, but the moment the power of sale is exercised the mortgagee becomes a trustee of the money for the mortgagors. The judgment of Lord Justice *Mellish* in *Richardson* v. *Younge* (7) is entirely in our favour. There is a clear distinction between a deed of trust and a mortgage: *Anon.* (8); *Scweitzer* v. *Mayhew* (9); one incident of which is that on such a

(1) 13 Sim. 584.
(2) 6 Hare, 75.
(3) 12 Sim. 402.
(4) Law Rep. 8 Ch. 30.
(5) Law Rep. 10 Eq. 275; Ibid. 6 Ch. 478.
(6) 2 H. & M. 400.
(7) Law Rep. 6 Ch. 478.
(8) 6 Madd. 10.
(9) 31 Beav. 37.

C. A. 1879

In re ALISON. JOHNSON *v.* MOUNSEY.

deed the mortgagor cannot be foreclosed. The statute does not begin to run until the sale has taken place. If the trust has ceased, why is the deed of trust recited in the conveyance? The mortgagee has had the benefit of the power of sale, and must take the onus. As to the vendors being trustees, they may be liable to their *cestuis que trust* for what they have done, but that does not affect the mortgagors. If the trustees considered themselves absolute owners, why did they consult the solicitor of the mortgagors? That alone would be enough.

Glasse, in reply:—

The form of the mortgage makes no difference. The mortgagee has the legal estate, and when he takes possession he becomes the absolute owner, subject to redemption, which is barred after twenty years. As to the alleged communications between *Mounsey* and *Douglas*, they were made by *Mounsey* in his character of land agent, and not by him as trustee, and he merely consulted *Douglas* as a person who knew the value of the property; nor could one trustee bind the other by any acknowledgment.

MALINS, V.C., stated the facts of the case, and observed that nothing was alleged or proved to shew that after *Alison* took possession of the property he did anything to recognise the title of the mortgagors, or their right to redeem. His Lordship was of opinion that the security taken by Mr. *Alison* was undoubtedly a mortgage, although it had not all the incidents of a mortgage made by a conveyance subject to redemption, and his Lordship then continued:—

The trustees might have stood upon their rights, and might have said, "Mr. *Alison* was in possession from 1849 to 1874, and we have been in possession since his death, therefore the mortgagee has been in possession for twenty-seven years without any recognition whatever of the title of the mortgagors. We are owners in fee simple, and as such owners we sell the property." But what is the course they did take? They certainly put the surviving mortgagor to considerable trouble and considerable expense, for they consulted her adviser how the property should be sold, what the price should be, how it should be planned, and in every

way consulted him as having an interest in this property. Now why, if they intended to stand upon their rights, did they trouble him, except that they were then taking a course which I am surprised, and I cannot too strongly express my surprise, that they have thought it worth while to depart from. They have, however, thought it worth while to occupy the time of this Court for at least a full ordinary day's sitting upon this question; and these mortgagees, representing this enormous estate, when they could afford to be generous to those who stood behind them, have occupied all this time in argument, though they have got every farthing due to them for principal, interest, and costs. They conceive it to be their duty on behalf of these infants—who are my wards, and on whose behalf I never would have allowed such a litigation, if I had been consulted in the matter as I ought to have been—to go on with this litigation for the purpose of increasing the property of these infants, who have already got £400,000 or £500,000, by the sum of £1950.

Their conduct at first was conclusive evidence that they intended to act in an equitable and just manner, namely, that the estate of the mortgagee should have every farthing which was due for principal, interest, and costs; and when that demand was satisfied, those who had been for thirty-three years out of their money, namely, Mrs. *Mills'* representatives, should have what remained, and thus justice would have been done. The evidence shews most distinctly how the parties who had the conduct of the business acted, and that in every step taken for the sale of this property the second mortgagees were consulted, and that the interest of the trustees was limited to the interest of Mr. *Alison*, the mortgagee. Now Mr. *Glasse* says that this goes for nothing, because the case is within the 28th section of the *Statute of Limitations*. I shall certainly not be the Judge to narrow the effect of that section, because I hold on this, as I have held on other occasions, that the interests of society are best promoted by adhering to the *Statute of Limitations*, and making time an end of all disputes. But I have to consider, with reference to the authorities, and with reference to the whole transaction, whether this section does in fact apply to the case before me. The evident intent of this statute is to bar the right of the mortgagor to redemption. If a

C. A. 1879 *In re* ALISON. JOHNSON *v.* MOUNSEY. V.-C. M.

mortgagor, therefore, brings an action for redemption—if this very mortgagor, or the second mortgagee claiming through her, had brought an action for redemption—this 28th section would be conclusive against them. I am fully aware of those cases, and I entirely adhere to them, which decide that where the mortgagee has been in possession for more than twenty years he may resort to his power of sale. That course is very convenient, because if, for instance, he has been in possession for twenty-one or twenty-two years without an acknowledgment to the mortgagor, and makes his title by virtue of his ownership, he would have to prove what is very difficult—to prove, namely, a negative, that there never has been any acknowledgment given to the mortgagor. If, on the other hand, the time having expired, he resorts to his power of sale, then, whatever may be the rights between mortgagor and mortgagee, the purchaser gets a good title, and one which cannot be questioned. In this case, the mortgagee having been in possession for twenty-seven years, the trustees might have said, "We are owners. This was a mortgage made in 1827, and the mortgagee entered into possession in 1849, and has never in any way recognised the title of the mortgagors, and we have conveyed accordingly;" but they had recourse to this trust for sale. As I have said, it is not an ordinary mortgage deed, but it conveys the property to Mr. *Alison* to secure his debt and interest, and upon trust for sale. That is a trust which, as the authorities shew, the mortgagors could not have enforced. It is a mere mortgage. The mortgagee may fix his own time for exercising the power, and he may defer it as long as he likes. But if he or those claiming through him were to defer it to the end of a century, nobody can doubt that then he would not make out his title under the power of sale, but would make his title under the absolute ownership acquired by lapse of time. But they resorted to this trust for sale, and the question is whether they are not trustees of the surplus money for the mortgagor, or those claiming through the mortgagor.

Now, under all the circumstances of this case, looking at the great hardship on the second mortgagee, and that the first mortgagee has for thirty-three years had his interest, and has now had every farthing of principal, interest, and costs, and considering the

position of these infants who are the Plaintiffs in this suit, I should have every inclination to have recourse to any doctrine of the Court which would enable me to do an act of justice. I think I am armed with the power of doing so, and being armed with the power of doing so, it is my intention that this second mortgagee shall have the £1950 in question.

Mr. *Glasse* has referred to the case of *Locking* v. *Parker* (1), which is very much in point. It was a case in which the mortgage in question was created in 1829. The power of sale was exercised within twenty years, and in that state of things a bill for an account and sale was filed in 1871, which I can look upon only as a redemption suit. The Master of the Rolls thought it a case where the mortgagors ought to be allowed to have the benefit of the redemption. The Lords Justices, from whom I am bound to take the law, took a different view, and said that there would be no right of redemption. The mortgage there was precisely in the same form as in this case, except that, instead of the mortgagee himself being made the trustee, somebody else was made so for him; but that, I think, makes no difference, and the Lords Justices decided that there was no right of redemption. Lord Justice *James* thus expresses himself (2): "It is said, however, that there is an express trust in the deed with reference to the sale moneys." Mr. *Glasse* contended that these passages had no meaning, at least I understood him to say so, but I must attribute to the Lords Justices that they mean what they say, and I am very glad they did say so, because I think it does justice. The Lord Justice *James* then says: "The Solicitor-General in his argument admitted that there might be an express trust with reference to the sale moneys, exactly in the same way as where a mortgagee sells under the powers of a common mortgage. In that case when the estate has been sold there is an express trust of the surplus money for the mortgagor. If then there had been any allegation in this bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys. But that is not the frame and intention of the bill. The bill prays the execution of the trusts of the indenture, and is in substance a bill for the redemption of the estate, which, under the circumstances,

(1) Law Rep. 8 Ch. 30. (2) Law Rep. 8 Ch. 40.

C. A. 1879 *In re* ALISON. JOHNSON *v.* MOUNSEY. V.-C. M.

cannot, according to the view we have taken, be sustained, and I am of opinion that we cannot go out of our way to give any relief in respect of this trifling matter." This I understand to mean that if the property is sold under the trust for sale, then there is a trust of the sale moneys which the twenty years does not bar. That makes it to my mind rational. If in the present case, as I have already said, resting upon ownership derived from the long possession, they had thought fit to sell the property by virtue of the ownership, they would then have been simply mortgagees in possession without any recognition of the title of the mortgagor for more than twenty years; and the mortgagor, or anybody claiming under the mortgagor, could not have had any claim against them. But they elected to execute the trust created in 1827, and to treat it as a still subsisting trust. That obliges them, if they sell the property, first to pay all the expenses, and then to pay the principal, interest, and costs, and to hold the surplus expressly in trust for the mortgagors, their heirs and assigns. Therefore I have the authority of the Lord Justice, and if I were to do otherwise than decide that the second mortgagee was entitled to the surplus, I should be deciding in direct opposition to the language used by him, which in my opinion meets the justice of the case. I cheerfully follow it, and therefore I am very happy, upon that authority, to say that in this case, the land having been sold under the power of sale, the mortgagees are trustees of the surplus money, as in every transaction relating to the business they admitted themselves to be. Having induced the second mortgagee at one time to expect that the surplus should be handed over to him, anything more ungracious on the part of these trustees or the next friend, or whoever put the machinery into operation, I cannot conceive, and therefore I dismiss the summons with costs.

C. A.

The infant legatees appealed. The appeal was heard on the 12th of March.

Glasse, Q.C. (*Snow* and *Oswald* with him), in support of the appeal, was stopped by the Court.

Bristowe, Q.C., and *Warmington*, for the trustees of *Alison's* will.

C. A. 1879

In re ALISON. JOHNSON *v.* MOUNSEY

Higgins, Q.C., and *H. P. Lawrence*, for the representatives of the second mortgagee:—

The deed in this case is not a mortgage deed, but creates an express trust for the mortgagor. If the mortgagee sells, an express trust attaches on the money, which is not the case in a common mortgage, and the case comes under sect. 25 of 3 & 4 Will. 4, c. 27.

[JESSEL, M.R.:—There is no difference. Though the mortgagor might not be able to foreclose, yet if he had filed a bill to redeem, and his bill had been dismissed, he would have been foreclosed. A mortgagee cannot be a trustee for the mortgagor. No duty is imposed on him.]

But for *Locking* v. *Parker* (1) it would appear that a duty was imposed on the mortgagee. This form of mortgage was probably discontinued for that very reason: *Kirkwood* v. *Thompson* (2); *Sweitzer* v. *Mayhew* (3); *In re Underwood* (4). An effectual acknowledgment may be made after the twenty years: *Stansfield* v. *Hobson* (5). The mortgagee in possession may if he pleases continue to be so, and it may be advantageous to him. Here he has kept the accounts as such, and that is payment of interest under sect. 40: *Brocklehurst* v. *Jessop* (6). It is a case of election, and the vendors have elected to sell under their power, and have so obtained a better price, the surplus of which ought, therefore, to go to the surviving mortgagor, whose estate was in fact sold by the execution of the power. It was the estate of the original mortgagors which passed by the conveyance: *Roach* v. *Wadham* (7): *Adams* v. *Angell* (8). This power has been used to defeat the equity of redemption in the mortgagors, and therefore the trust attaches. The mortgagees cannot take the money under the power and then reject the trust. The mortgagors were privy to the original deed, and therefore to the deed executed under that power. Had the deed not been made in this form it might turn out that the mortgagor had a right to redeem.

(1) Law Rep. 8 Ch. 30.
(2) 2 H. & M. 392; 2 D. J. & S. 613.
(3) 31 Beav. 37.
(4) 3 K. & J. 745.
(5) 16 Beav. 236; 3 D. M. & G. 620.
(6) 7 Sim. 438.
(7) 6 East, 289.
(8) 5 Ch. D. 634.

C. A. 1879 *In re* ALISON. JOHNSON *v.* MOUNSEY.

JESSEL, M.R. :—

This is an appeal from the decision of Vice-Chancellor *Malins*, and it has been argued before us in a very extraordinary way. The Vice-Chancellor has stated his view of the law, and then, for reasons which he has given, has treated this case as exceptional. The counsel, in supporting the judgment of the learned Judge of the Court below, have thrown over his reasons for the exception, and have argued entirely against his view of the law. In other words, they ask us to support the decision upon the ground that the whole of the judgment, with the exception of the last few words, is entirely erroneous. I agree that it is entirely within the province of counsel to take such a course if they think fit, and I must assume that no other course was reasonably open to them, otherwise they would have preferred to support the judgment of the Vice-Chancellor for the reasons which he gave.

Now I think that the law laid down by the learned Vice-Chancellor as applicable to this case was entirely right, so far as it has been argued against, and I do not know that I could state it better than he has done. The single point where I have the misfortune of differing from him is the reason which he gave for the exception of this case, as to which I have not heard a single word of argument upon the present occasion, and therefore I will assume that the counsel for the Respondents thought that point, as I myself do, wholly untenable.

There was in this case what is even now by no means an uncommon form of mortgage, and what was at the beginning of this century a most common form of mortgage, a conveyance reciting the loan and the intended security, and then a grant or release of the land to the mortgagee upon trust when he thought fit to sell, or, as in this case, to sell or mortgage, with a declaration of the trusts of the money, and a further declaration that whenever he chose he might enter and take the rents and apply them in keeping down the interest, and that is all.

Now the question, which has been argued with great deliberation, has been whether the *Statute of Limitations* applies to such a case, and this question has been argued in utter defiance of the fact that the exact point had been decided by the Court of Appeal, reversing the decision of the late Master of the Rolls, and settling

the law exactly as the Vice-Chancellor laid it down. He laid it down in words which so fully express the law that I am going to read them as part of my own judgment. The Vice-Chancellor says: "I am fully aware of those cases, and I entirely adhere to them, which decide that where the mortgagee has been in possession for more than twenty years he may resort to his power of sale. That course is very convenient, because if, for instance, he has been in possession for twenty-one or twenty-two years without an acknowledgment to the mortgagor, and makes his title by virtue of his ownership, he would have to prove what is very difficult to prove, namely, a negative, that there never has been any acknowledgment given to the mortgagor. If, on the other hand, the time having expired, he resorts to his power of sale, then, whatever may be the rights between mortgagor and mortgagee, the purchaser gets a good title, and one which cannot be questioned. In this case, the mortgagee having been in possession for twenty-seven years, the trustees might have said, 'We are owners; this was a mortgage made in 1827, and the mortgagee entered into possession in 1849, and has never in any way recognised the title of the mortgagor, and we have conveyed accordingly;' but they had recourse to this trust for sale. As I have said, it is not an ordinary mortgage deed, but it conveys the property to Mr. *Alison* to secure his debt and interest, and upon trust for sale. That is a trust which, as the authorities shew, the mortgagors could not have enforced. It is a mere mortgage." Against that I have not a word to say, and it brings us to this, that in 1874 Mr. *Alison* was owner in fee simple of this estate. He devised it to trustees upon trust for sale. They sold it in 1876; but what power had they to alter the rights of Mr. *Alison's* devisees in trust, or the rights of their *cestuis que trust?* They could not give away Mr. *Alison's* property to the prejudice of Mr. *Alison's* legatees, even if they had been so minded. Their title being only as devisees in trust they could not have given away the surplus to the second mortgagee or to anybody else. They were owners in fee simple with a mere trust for sale, and whatever form of conveyance they adopted, they could not without committing a breach of trust have set up a title which had been extinguished by the *Statute of Limitations.* The difference be-

C. A. 1879 *In re* ALISON. JOHNSON *v.* MOUNSEY. Jessel, M.R.

tween the statute of *William* IV. as regards real property and the well-known *Statute of Limitations* of *James* I. as regards personal property, debts, and liabilities, is well known. The statute of *James* merely destroys the remedy, but the statute of *William* IV. destroys the title, and therefore it is impossible for trustees of real estate to set up an old title which is nonexistent, and to give away the property in their hands. The Vice-Chancellor seems to have treated the case exactly as if Mr. *Alison* has been living and had made the conveyance; but it is manifest that these trustees would have been guilty of a breach of trust if they had actually done what the Vice-Chancellor seems to have held that they have done, and they could not by any action of theirs have conferred any title on the Respondents.

It was argued that the 25th section of the statute 3 & 4 Will. 4, c. 27, applied, and the 28th section did not apply. The exact point was decided, and decided in that way, by Lord *Romilly* in *Locking* v. *Parker*. The case then came before the Court of Appeal in Chancery (1), and it was reversed on the very simple ground that a document similar to this in all substantial particulars was a mortgage, and nothing more, although it contained also a trust for sale. I read two sentences from the judgment of Lord Justice *James*, because this puts it so plainly, as shewing not only what the decision actually was, but why he came to the conclusion. His Lordship says (2): "The next point which has been argued before us is whether the deed of February, 1829, standing by itself is anything more than a mortgage deed with a power or trust for sale. I am of opinion that it is nothing more than a common mortgage security taken by way of a trust for sale, and taken, for very obvious reasons, in the name of a third person." Then, after quoting a decision of Vice-Chancellor *Wood* in *Kirkwood* v. *Thompson* (3), and affirmed on appeal by Lord *Cranworth* (4), he proceeds: "If I may be permitted to say so, I entirely concur not only in those words but in the spirit of those words, that it is not for a Court of Equity to be making distinctions between forms instead of attending to the real substance and essence of the transaction." I also, if I may say so, entirely and cordially concur in

(1) Law Rep. 8 Ch. 30.
(2) Ibid. 39.
(3) 2 H. & M. 392.
(4) 2 D. J. & S. 613.

C. A. 1879

In re ALISON. JOHNSON *v.* MOUNSEY.

Jessel, M.R.

those observations. A mortgage it is, and a mortgage it was intended to be, slightly different, no doubt, from an ordinary mortgage as regards remedies, but a mortgage and nothing more. The trust is not enforceable, and therefore is not an express trust within the meaning of the 25th section of the statute. The words used by Vice-Chancellor *Wood* in *Kirkwood* v. *Thompson* (1), and quoted by the Lord Justice in *Locking* v. *Parker* (2), are: "I see no difference between the case of an ordinary mortgage and that of a trust for sale. It is not such a trust as would enable the mortgagor to file a bill to have the property sold, because the discretion as to selling or not is in the mortgagee alone. On the other hand the mortgagee cannot file a bill to foreclose, but is limited to his remedy by sale. But these distinctions make no substantial difference in his position, which is that of a mortgagee." I hold, therefore, that the 28th section of the statute applies; that Mr. *Alison* had a clear fee simple at the time of his death; that nothing which the trustees did or could do could give a title to the second mortgagee, or to any person claiming under the mortgagor; and the consequence is that the whole proceeds of this sale derived under the form of conveyance which, rightly or wrongly, they choose to adopt, belong to the testator's estate.

The result is that this appeal must be allowed. The Chief Clerk's certificate must be varied, and of course the costs must follow the event.

BAGGALLAY, L.J.:—

I am of the same opinion, and I have very little to add to what the Master of the Rolls has said. The Vice-Chancellor fully recognised the law to be as it has just been stated by the Master of the Rolls, but he founded his decision on certain passages which he found in the judgment of Lord Justice *James* in *Locking* v. *Parker*; however he does not seem to have adverted to the distinction that in that case the sale had been exercised as regards a sufficient portion of the estate to pay off the amount of principal money and interest before the period of twenty years had elapsed, and therefore before the time had arrived when the right of the mortgagor was barred. What the Lord Justice said is this: "In that

(1) 2 H. & M. 392, 402. (2) Law Rep. 8 Ch. 30.

C. A. 1879 *In re* ALISON. JOHNSON *v.* MOUNSEY.

case when the estate has been sold, there is an express trust of the surplus money for the mortgagor. If, then, there had been any allegation in this bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys, but that is not the frame and intention of the bill." But *dicta* and observations of this kind made by a Judge in the course of a judgment must be read with reference to the particular circumstances of the case before him. In that case had there been any surplus moneys after satisfying the principal money and interest due, the mortgagees would doubtless have had to account, because the trust had arisen before the estate was barred, but the distinction between that case and the present is this, that in the present case the sale did not take place until after the estate had been barred.

BRAMWELL, L.J.:—

I am of the same opinion.

Solicitors for Infant Legatees: *Crook & Smith,* agents for *W. K. Greenway, Liverpool.*

Solicitor for Trustees: *Lydall.*

Solicitors for Second Mortgagees: *S. W. Johnson & Son.*

C. A. 1879 *March* 26.

Ex parte GUTIERREZ. *In re* GUTIERREZ.

Debtor's Summons—Absconding Debtor—Foreigner temporarily in England returning Home—Intention to avoid Payment of Debt—Arrest—Absconding Debtors Act, 1870 (33 & 34 *Vict. c.* 76), *s.* 1.

When a debtor's summons is issued against a foreigner, who is in *England* for a merely temporary purpose, and he then prepares to return home, there is no presumption (as there might be in the case of a domiciled Englishman going abroad) that he is going away with the intention of avoiding payment of the summoning creditor's debt.

THIS was an appeal from a decision of Mr. Registrar *Murray,* acting as Chief Judge in Bankruptcy.

Jose Gutierrez was a Spanish subject. He resided at *Havannah,* in the island of *Cuba,* where he carried on the business of a merchant in partnership with *Francisco Argumosa.* At the be-

C. A.
1879
Ex parte GUTIERREZ.
In re GUTIERREZ.

ginning of the year 1879 they found that they were insolvent. They had some joint creditors in *England*, and it was arranged that *Gutierrez* should go to *England* to explain matters to the English creditors, and endeavour to make some settlement with them. He accordingly arrived in *England* on the 29th of January, and he then communicated with all the English creditors of the firm, and offered them a composition of 5*s.* in the pound. Several of the creditors, among whom were Messrs. *John Samson & Co.*, accepted the offer. The *Havannah* firm had no assets in *England*, but it was intended that the funds required for the payment of the composition should be remitted from *Havannah*. Some, however, of the English creditors refused to accept the offer, and commenced legal proceedings against the firm in *Havannah*, and placed an embargo on their assets. In consequence of this the composition arrangement could not be carried out, and *Gutierrez* received a telegram from his partner requesting him to return home. On the 15th of March he wrote to *Samson & Co.*, "In view of the resistance of some of my creditors to accept my proposition, I find myself compelled to set out for *Havannah*. Therefore you will please name some person there with sufficient power to represent you." On the 18th of March *Samson & Co.* issued a debtor's summons against him for £678 7*s.*, which they claimed to be due to them from the *Havannah* firm, and also obtained from the *London* Bankruptcy Court a warrant for his arrest under the *Absconding Debtors Act*, 1870. The warrant was obtained upon an affidavit made by one of the partners in the firm of *Samson & Co.*, in which he said, "I verily believe that the said *Jose Gutierrez* is about to leave *England* immediately, and return to *Havannah*, with the view of avoiding payment of the said debt, and of service upon him of a debtor's summons, or a petition in bankruptcy, or any other process used for the recovery of such debt." He also stated his belief that *Gutierrez* had a large sum of cash at his disposal available for the payment of the creditors of his firm. The warrant contained a recital that, "by evidence taken upon oath, it hath been made to appear to the satisfaction of the Court that there is probable reason to suspect and believe that the said *Jose Gutierrez* is about to go abroad with a view of avoiding payment of the debt for which the summons has been

C. A. 1879

Ex parte GUTIERREZ. *In re* GUTIERREZ.

granted." On the same day the debtor's summons was served on *Gutierrez*, and he was arrested under the warrant, and lodged in prison. He applied to the Court of Bankruptcy for his release, and made an affidavit, in which he said that all the assets of his firm were in *Havannah*, and that he had no funds in *England*, except a sum of less than £10, and that there was no ground for the assertion that he intended to abscond from *England* to avoid payment of any debt. The Registrar was of opinion that the debtor's summons had been properly issued, on the authority of *Ex parte Pascal* (1), and that, therefore, the provisions of the *Absconding Debtors Act* applied; and, being of opinion that the evidence shewed sufficient ground for the issuing of the warrant, he refused to order the release of the debtor. The debtor appealed.

Alexander, for the Appellant:—

The *Absconding Debtors Act*, 1870 (2), does not apply at all to a foreigner who comes to this country for a temporary purpose. But, if it does apply, there is no evidence of any intention on the part of the Appellant to avoid the payment of any debt, and he swears that he had no such intention.

[He was stopped by the Court.]

(1) 1 Ch. D. 509.

(2) The Act is intituled "An Act to facilitate the Arrest of Absconding Debtors."

The preamble recites: "Whereas the laws now in force for the arrest of debtors absconding from *England* are insufficient for that purpose: And whereas frauds may be perpetrated upon creditors by insolvent debtors departing for distant countries before the necessary proceedings can be taken to make them bankrupt."

Sect. 1 provides: "The Court may, by warrant addressed to any constable or prescribed officer of the Court, cause a debtor to be arrested and safely kept as prescribed until such time as the Court may order, if, after a debtor's summons has been granted in the manner prescribed by the said Act (the *Bankruptcy Act*, 1869), and before a petition in bankruptcy can be presented against him, it appear to the Court that there is probable reason for believing that he is about to go abroad, with a view of avoiding payment of the debt for which the summons has been granted, or of avoiding service of a petition of bankruptcy, or of avoiding appearing to such petition, or of avoiding examination in respect of his affairs, or otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy."

Sect. 2: "No arrest shall be valid or protected under this Act unless the debtor, before or at the time of his arrest, shall be served with the debtor's summons."

Winslow, Q.C., and *E. C. Willis*, for the summoning creditors:—

It is clear that the debtor's summons was properly issued: *Ex parte Pascal* (1). And then the issue of the warrant properly followed under sect. 1 of the Act of 1870, as the debtor was about to leave *England*. The object of a debtor's summons is to compel the payment of the debt, or the commission of an act of bankruptcy on which an adjudication can be obtained. If the debtor is allowed to go away an adjudication of bankruptcy against him cannot be obtained, for he will not commit an act of bankruptcy in *England*.

[JAMES, L.J.:—Suppose a man is going in a steamer from *Hamburg* to *New York*, and the steamer puts into *Southampton Water*, and he is there served with a debtor's summons, could it be said that he was absconding with the intention of avoiding payment of the debt?

JESSEL, M.R.:—Your argument must go to that extent. The Act is aimed at absconding debtors. A man who goes away does not necessarily abscond.

JAMES, L.J., referred to *Ex parte Crispin* (2).

JESSEL, M.R.:—In that case Lord Justice *Mellish* pointed out (3) that the inference in the case of an Englishman going abroad is very different from what it is in the case of a Parisian going home to *Paris*.]

At any rate, the fair conclusion from the evidence is that the Appellant was going to avoid paying his debts.

JESSEL, M.R.:—

I must say it appears to me that the process of the Court of Bankruptcy has been abused, by which I mean that it has been knowingly used for an improper purpose, contrary to the plain meaning of the Act and the justice of the case. [After referring to the preamble of the Act of 1870, and the provisions of sect. 1, his Lordship continued:—] The facts are simply these: A Spanish subject, who is a partner in a firm at *Havannah*, trading and domiciled in *Havannah*, not trading and having no assets in this

(1) 1 Ch. D. 509. (2) Law Rep. 8 Ch. 374.
(3) Law Rep. 8 Ch 382.

C. A. 1879 *Ex parte* GUTIERREZ. *In re* GUTIERREZ.

country, but owing some debts here, comes to *England* on behalf of his firm to inform their English creditors that the firm are insolvent, and are desirous of offering a composition. For that reason only he came to *England* temporarily. He made an offer of a composition which these very creditors, who have now arrested him, were willing to accept. There was a difficulty in raising even the amount of the composition, and he was asked by his partner to return home. He thereupon wrote to these creditors, telling them that he was going to return home. Then they issued the debtor's summons, and obtained the warrant for his arrest. It does not appear to me that there is the slightest evidence that he was going away with the intention of avoiding payment of this debt. It is not suggested that his firm were not liable for the debt, or that his going away would affect their liability. In my opinion there is no ground whatever for supposing that he was going abroad for any such purpose; indeed I am quite satisfied that he was not. I should be very much surprised if after the evidence which has been given these creditors would now be ready to make an affidavit of their belief that he was going away with the intention of avoiding the payment of their debt. The warrant must be set aside and the prisoner discharged.

JAMES, L.J.:—

I entirely agree. The order of the Registrar must be set aside with costs in both Courts, and the prisoner must be discharged at once. I should not have thought it possible, after the distinction between an Englishman and a foreigner had been so clearly explained by Lord Justice *Mellish* in *Ex parte Crispin* (1), that such an order could have been made.

BRAMWELL, L.J.:—

I agree. I am not sure that when the warrant is discharged there will be any answer to what we used to call an action of trespass for false imprisonment.

Solicitor for Debtor: *H. Montagu.*
Solicitors for Creditors: *Pritchard, Englefield, & Co.*

(1) Law Rep. 8 Ch. 382.

Ex parte ASTRUP. *In re* LE FEVRE.

C. A. 1879 March 27.

Debtor's Summons—Bankruptcy Petition—Tender of Part of Debt—Refusal to Accept—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7, 8, 9.

In an action upon a bill of exchange for £40 an order was made staying the proceedings on the Defendant's undertaking to pay to the Plaintiffs (in addition to £20 which had been paid into Court) £20 10*s.* and the costs of the action. In default of payment the Plaintiffs were to be at liberty to sign judgment and issue execution. The costs having been taxed at £9 2*s.*, the Defendant tendered £29 14*s.* 6*d.* to the Plaintiffs, but they refused to accept it unless the Defendant would also pay another overdue acceptance of his for £30 which the Plaintiffs held. He refused to pay the £30, alleging that that acceptance had been obtained from him by fraud, with notice of which the Plaintiffs had taken it. The Plaintiffs then issued a debtor's summons against the Defendant for £59 14*s.* 6*d.* The Defendant applied to dismiss it, and he was ordered to give security for the amount claimed. The security not having been given, the Plaintiffs presented a bankruptcy petition against him:—

Held, that until judgment had been signed in the action, the £29 14*s.* 6*d.* could not be used to support a debtor's summons, and consequently that there was not a debt sufficient to support a bankruptcy petition.

Per James, L.J.: The debtor's summons ought to have been dismissed.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 9th of September, 1878, Messrs. *Astrup & Harland* commenced an action in the Mayor's Court of the City of *London* against *W. H. Le Fevre*, a trader, upon a bill of exchange for £40, which he had accepted and of which they were the indorsees. The bill had been dishonoured at maturity. *Le Fevre* obtained leave to defend the action upon the terms of paying £20 into Court. On the 17th of October, upon the application of the Defendant, an order was made staying all further proceedings in the action, he undertaking to pay the sum of £20 10*s.*, together with the taxed costs of the action, beyond the £20 in Court. And it was further ordered, that, if default should be made in payment of the £20 10*s.* and costs, the Plaintiffs should be at liberty to sign final judgment and issue execution for the £20 10*s.* and costs. The £20 in Court was paid out to the Plaintiffs. On the 24th of October the costs of the action were taxed at £9 2*s.* On the same day the Defendant tendered £29 14*s.* 6*d.* to the Plaintiffs'

C. A. 1879 *Ex parte* ASTRUP. *In re* LE FEVRE.

solicitor, but he refused to receive it unless the Defendant would also pay £30, the amount of another overdue acceptance of the Defendant which the Plaintiffs then held. This the Defendant refused to pay. On the same day the Plaintiffs issued a debtor's summons against *Le Fevre* for £59 14*s.* 6*d.*, being the £20 10*s.*, the £30, the £9 2*s.* costs, and 2*s.* 6*d.* for interest. *Le Fevre* applied to have the summons dismissed. He deposed that the Plaintiffs took the acceptance the day before it became due, and after they had received notice from him that it had been obtained from him by fraud. On the hearing of the application, the Registrar made an order that *Le Fevre* should give security for the debt claimed. No security was given within the time limited, and on the 9th of January the Plaintiffs presented a bankruptcy petition against *Le Fevre* in respect of the £59 14*s.* 6*d.*, alleging as an act of bankruptcy the failure to comply with the debtor's summons. The Registrar dismissed the petition with costs. The petitioning creditors appealed.

Maidlow, for the Appellants:—

No tender was made after the debtor's summons was issued. It would not then have been enough to tender a part of the amount claimed; the whole must have been tendered: *In re Andrew* (1). At any rate, a tender before the issue of the summons is not sufficient. A tender does not discharge the debt. In an action the Defendant would have to plead that he had always been ready and willing to pay the whole debt, and there should be a tender in Court: *Dixon* v. *Clark* (2).

Yate Lee, for the debtor:—

The Court has a discretion; it is not bound to make an adjudication. The debtor did all he could to comply with the order in the action; there was no default on his part.

Maidlow, in reply.

JAMES, L.J.:—

I am of opinion that the order of the Registrar was quite right. These creditors thought that they could resort to a very ingenious

(1) 1 Ch. D. 358. (2) 5 C. B. 365.

device, and make use of the bankruptcy law in a way in which it was never intended to be used. They had a debt of £29 14*s.* 6*d.*, and in order to get a debt above £50 they were minded to take a bill for £30 which the debtor had accepted, though they had received notice that he disputed his liability upon it on the ground that it had been obtained from him by fraud. They evidently did this in order to make their debt above £50. And, having placed themselves in that position, they actually refused to receive the £29 14*s.* 6*d.* when it was tendered to them under the order made in the action on the £40 bill. That bill, however, as a bill, was settled by the order, and the rights of the Plaintiffs in respect of it were converted into the rights given to them by the order. Their sole right under the order was to sign judgment and issue execution if the Defendant did not pay the £20 10*s.* and the costs. He has tendered the £20 10*s.* and the costs. If he now refuses to pay, they are still entitled to sign judgment, and they have no other right. Under these circumstances I think the creditors have failed in their device, and the Registrar was quite right in refusing to make an adjudication on the petition, which I think was a very oppressive proceeding.

BAGGALLAY, L.J.:—

I entirely agree.

BRAMWELL, L.J.:—

I agree. The creditors are still at liberty to sign judgment if the Defendant does not fulfil his undertaking. If judgment is signed the debt would then be a judgment debt, not a debt upon the bill, and the judgment debt might be used for the purpose of a debtor's summons.

JAMES, L.J.:—

The matter is not now before us, but I do not think this was a proper case for a debtor's summons. I think the summons ought to have been dismissed.

Solicitors for Appellants: *Herbert & Kent.*
Solicitor for Respondent: *J. H. Shakespear.*

C. A.
1879
March 27;
April 3.

Ex parte KELLY & CO.
In re SMITH, FLEMING, & CO.

Fraudulent Preference—Repayment of Money sent to meet Specific Bills—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.

13 Ch D 724

The provisions of sect. 92 of the *Bankruptcy Act*, 1869, apply only to transactions between a debtor and persons who are, in the strict sense of the words, his creditors.

In September remittances to the amount of £5300 were sent by a firm at *Glasgow* to a firm in *London*, to enable the latter to take up some bills of exchange, drawn by the *Glasgow* firm upon and accepted by the *London* firm, which were to become due on the 5th of October, the arrangement between the two firms being that the *Glasgow* firm should provide the funds to meet the bills at maturity. The *London* firm kept a banking account at the *Bank of England*, for the purpose of meeting all their acceptances, and intended that the £5300 should be paid to that account, but, through the mistake of a clerk, only £3300 was paid there, £2000 being paid to the *London Joint Stock Bank*, where the *London* firm kept their general banking account. On the 2nd of October the *London* firm found that they were insolvent, and called in an accountant to investigate their affairs, and on the 3rd of October they announced to their creditors that they had suspended payment. On the 2nd of October they drew a cheque for £5300 on the *Bank of England* (to which they then supposed that all the remittances of the *Glasgow* firm had been paid), intending to repay it to the *Glasgow* firm, but their solicitors advised them that it was doubtful whether they could legally do so, and the £5300 was thereupon placed in a third bank in the joint names of two of the partners of the *London* firm. On the 3rd of October they discovered the mistake of their clerk, and attempted to withdraw the £2000 from the *London Joint Stock Bank*, but could not do so, because that bank claimed a lien on the balance of their account. The *Glasgow* firm took up the bills at maturity, and the £3300 was paid to them. But the £2000 was placed in the hands of the accountant, pending the decision of the rights of the parties. On the 1st of November the *London* firm filed a liquidation petition, under which the accountant was appointed trustee of their property. They had not committed any act of bankruptcy before the filing of the petition:—

Held, that, as the *London* firm never intended to misappropriate the £2000, the relation of debtor and creditor never arose in respect of it between them and the *Glasgow* firm, and consequently the *London* firm could properly have employed and ought to have employed the £2000 in meeting the bills on the 5th of October.

The trustee was therefore ordered to pay the £2000 to the *Glasgow* firm.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

C. A.
1879
Ex parte KELLY & Co.
In re SMITH, FLEMING, & Co.

On the 2nd of July, 1878, *Kelly & Co.*, of *Glasgow*, drew upon *Smith, Fleming, & Co.*, of *London*, two bills of exchange, respectively for £5000 and £4500, which *Smith, Fleming, & Co.* accepted. The bills were to become due on the 5th of October, 1878. They were discounted by *Kelly & Co.*, and the arrangement between the two firms was that *Kelly & Co.* should provide the funds to meet them at maturity. On the 27th of September *Kelly & Co.* sent to *Smith, Fleming, & Co.* a cheque for £2000, in a letter in which they said, "which you will please apply in payment of your acceptances to us due 5th prox." On the 28th of September *Kelly & Co.* sent to *Smith, Fleming, & Co.* a cheque for £2500, and on the 30th of September a cheque for £800, requesting them to apply those sums to the same purpose. *Smith, Fleming, & Co.* acknowledged the receipt of the three cheques (together amounting to £5300) as in part payment of their acceptances due on the 5th of October. On the 1st of October *Kelly & Co.* sent to *Smith, Fleming, & Co.* another cheque for £1000, to be applied by them to the same purpose. On the 2nd of October *Smith, Fleming, & Co.* wrote to *Kelly & Co.* as follows:—"We separately return your cheque for £1000. With regard to the balance received from you against bills due on Saturday, your cheques as received were paid as usual into our account at the *Bank of England*, where our acceptances are payable. We apprehended no danger, and did not bank them specially. On proposing to-day to withdraw these remittances for the purpose of paying them into your account at the *National Bank of Scotland*, our lawyers, and the accountants, Messrs. *Harding*, in whose hands we are placing our affairs, have questioned the legality of our doing so. The money having been remitted for a specific purpose, and, as we have made no stoppage, we contended we had a right to withdraw it from our general banking account, and specifically apply it, but they forbad our doing so. In order, however, to protect your interests as far as we possibly could, we have paid £5300 into a special account in the *National Bank of Scotland* in the names of the writer and of Mr. *M'Ilwraith* (two of the partners in the firm of *Smith, Fleming, & Co.*), so that, in case it be hereafter adjudged that this money can legally be applied to the payment of your bills it will be preserved intact. We very deeply regret that this is the utmost we

C. A. 1879 *Ex parte* Kelly & Co. *In re* Smith, Fleming, & Co.

could do, and we fear that, whatever be the ultimate decision, you will be put to considerable present inconvenience. We trust, however, you will acquit us of blame in the matter. Having no apprehension of the disaster which has occurred so suddenly, we banked your cheque as usual where our acceptances were payable." This letter was witten in consequence of the stoppage of the *City of Glasgow Bank*, to which *Smith, Fleming, & Co.* were under large liabilities. The £5300 was paid by means of a cheque drawn upon the *Bank of England*, where *Smith, Fleming, & Co.* kept an account for the purpose of meeting all bills accepted by them. The two bills drawn by *Kelly & Co.* had been made payable there. *Smith, Fleming, & Co.* kept their general banking account at the *London Joint Stock Bank*. When the letter was written *Smith, Fleming, & Co.* believed that all the three cheques for £2000, £2500, and £800 sent by *Kelly & Co.* had been paid into the *Bank of England*, as was intended, but on the 3rd of October it was discovered that, by the mistake of a clerk, the cheque for £2000 had been paid into the *London Joint Stock Bank*. The same day *Smith, Fleming, & Co.* attempted to withdraw the £2000 from that bank, but the bank, who claimed a lien upon the balance of the account for moneys due to them by *Smith, Fleming, & Co.*, refused to honour the cheque. On the evening of the 3rd of October *Smith, Fleming, & Co.* issued a circular to their creditors, announcing that they had suspended payment. On the 4th of October the solicitors of *Kelly & Co.* wrote to the solicitors of *Smith, Fleming, & Co.*:—"We must on behalf of Messrs. *Kelly & Co.* require that the remittances of £2000, £2500, and £800 made by them to Messrs. *Smith, Fleming, & Co.* on the 27th, 28th, and 30th ult. be applied according to the directions contained in the letters of those dates containing those remittances, failing which we shall advise Messrs. *Kelly & Co.* to take the most prompt measures in their power to obtain redress. We may mention that we have given the *National Bank* notice not to part with the £5300 in their hands, except with the authority of Messrs. *Kelly & Co.*, but we are quite willing to withdraw such notice if Messrs. *Smith & Co.* desire to apply that money towards payment of the bills." The same day the solicitors of *Smith, Fleming, & Co.* replied as follows:—"Before receipt of your letter we had again gone into

the matter with our clients, and they had signed cheques on the *National Bank of Scotland* for £3300 and £2000, and were prepared to deal with them as follows—to apply the £3300 towards meeting the bills due to-morrow, and to pay the £2000 to Mr. *R. P. Harding*, with notice of the facts, in order that he might hold it subject to the ascertainment of the rights of all parties . . . Our clients are willing under our advice to deal with the £5300 as above indicated, and we hope you will see your way to falling in with this plan. They deeply regret that by inadvertence the £2000 were so paid as to become mixed with their own moneys, and to be withheld by the bank, and they trust your clients will be declared entitled to the amount notwithstanding, but we cannot allow them in the present juncture to take £2000 absolutely out of their other moneys to replace it irrevocably." The arrangement thus proposed was assented to by *Kelly & Co.* They took up the bills, and the £3300 was paid to them, the £2000 being placed in the hands of Mr. *Harding*. On the 1st of November *Smith, Fleming, & Co.* filed a liquidation petition. They had not previously committed an act of bankruptcy. Their creditors resolved on a liquidation by arrangement, and appointed *Harding* trustee. *Kelly & Co.* applied to the Court for an order that the £2000 should be paid over to them. The Registrar dismissed the application, on the ground that, as *Smith, Fleming, & Co.* knew on the 2nd of October that they were insolvent, they could not, as against their general creditors, replace the £2000 out of their general assets for the purpose of applying it to meet the bills.

Kelly & Co. appealed.

Herschell, Q.C., and *Arnold Morley*, for the Appellants:—

On the 3rd of October *Smith, Fleming, & Co.* could lawfully have paid over the £2000 to *Kelly & Co.* Though they were then insolvent, they did not commit any act of bankruptcy until the 1st of November, when they filed their petition. If they had repaid the £2000 on the 3rd of October, the payment would not have been a fraudulent preference. It was their duty to replace the money which had been sent to them for a specific purpose. Sect. 92 would not have applied. The money now stands in the same position as if it had been actually paid over under pressure.

C. A. 1879

Ex parte KELLY & Co. *In re* SMITH, FLEMING, & Co.

It is the duty of *Harding* now to pay it to us if it could have been lawfully paid to us when our solicitors demanded it, which it clearly could: *Butcher* v. *Stead* (1); *Sinclair* v. *Wilson* (2); *Ex parte Sayers* (3). *Smith, Fleming, & Co.* never intended to pay the money into their general account.

[JAMES, L.J.:—Sect. 92 only avoids a preference of a creditor. Was there ever the relation of debtor and creditor between *Smith, Fleming, & Co.* and *Kelly & Co.* in respect of the £2000? The money had been sent to *Smith, Fleming, & Co.* for a specific purpose, in which both the firms had a common interest, and, unless and until a breach of trust was committed by *Smith, Fleming, & Co.*, the relation of debtor and creditor could not exist. They never intended to misappropriate the money, and the question is, whether the law of bankruptcy compels the Court to direct a misappropriation now?]

W. D. Gardiner (*Benjamin*, Q.C., with him), for the trustee:—

The money was not ear-marked, the account at the *Bank of England* not relating to the bills accepted for *Kelly & Co.* alone; therefore there was technically a breach of trust, and the relation of debtor and creditor arose. If *Smith, Fleming, & Co.* had taken up the bills knowing that they were insolvent, or had repaid the money to *Kelly & Co.* to enable them to do so, that would have been a fraudulent preference. If a trust fund is paid to a separate account, which is not designated as a trust account, a breach of trust is committed; and if the trustee becomes bankrupt, the only remedy of the *cestui que trust* is to prove in the bankruptcy, unless the fund can be ear-marked: *Brown* v. *Adams* (4). *Smith, Fleming, & Co.* only intended to appropriate the money if they could lawfully do so; they had no intention of making a preference. If an action had been brought to enforce the trust of the money, the liquidation petition would have been filed at once, and an injunction would have been obtained to stop the proceedings. *Ex parte Sayers* is in our favour; it shews how trust money may be followed. The £3300 could be followed, but the £2000 could not. If the £2000 had been actually paid under

(1) Law Rep. 7 H. L. 839.
(2) 20 Beav. 324.
(3) 5 Ves. 169.
(4) Law Rep. 4 Ch. 764.

the pressure of the solicitor's letter, possibly the payment might have been valid, but no payment was in fact made. On the 2nd of October *Kelly & Co.* were only creditors for the £2000, and their only remedy now is to prove, unless they can trace the money. They cannot do that, because the lien of the *London Joint Stock Bank* gives them a better title.

Herschell, in reply :—

Our title to the £2000 is really as good as it is to the £3300.

JAMES, L.J.:—

I am of opinion that the appeal ought to be allowed. There would be no ground, as it seems to me, for impeaching the transaction, unless it could be brought up to this—that it was a payment made voluntarily by way and with the intent of preferring a particular creditor, which is a thing expressly prohibited by the bankruptcy law. No doubt if a trustee commits a breach of trust, by stealing or otherwise misappropriating the trust moneys, he becomes a debtor to his *cestui que trust* in respect of the money which he has thus improperly taken, and if he becomes a debtor in that way, he remains only a debtor, and the *cestui que trust* only a creditor, unless he can "ear-mark" the money which the trustee has misappropriated. But I do not think it is for a Court of Law to compel a man to be a thief, or to hold that he intended to be or that he did become a thief, and therefore a debtor in respect of the money stolen by him, when he had no such intention. In this case I am satisfied that there never was a moment of time in which *Smith, Fleming, & Co.* meant to commit any breach of trust, or to make any misappropriation whatever of the moneys which had been sent to them for a specific purpose, and it is not for this Court, as it seems to me, to put them in the position of having stolen moneys which they never intended to steal.

There being bills of exchange outstanding, of which *Smith, Fleming, & Co.* were the acceptors, and *Kelly & Co.* the drawers, the bills being made payable at the *Bank of England*, *Kelly & Co.* being the persons who, by arrangement between themselves and *Smith, Fleming, & Co.*, were to keep the latter out of cash advances, but who still were only liable on the bills themselves secondarily

C. A. 1879

Ex parte KELLY & Co. *In re* SMITH, FLEMING, & Co.

James, L.J.

as drawers, *Kelly & Co.* made remittances to *Smith, Fleming, & Co.*, specifically for the purpose of taking up the bills. The making of those remittances did not create any relation of debtor and creditor between *Smith, Fleming, & Co.* and *Kelly & Co.* *Kelly & Co.* could not have called back the moneys, could have brought no action against *Smith, Fleming, & Co.* in respect of the moneys which they had so remitted, because the moneys were given to *Smith, Fleming, & Co.* to discharge the bills for which they were primarily liable, and therefore the moneys were received by *Smith, Fleming, & Co.* for a purpose in which both they and *Kelly & Co.* were equally interested as between them and the holders of the bills. Having received the moneys for that purpose, they paid some of them, and intended to pay the whole, into the *Bank of England*, where they would be ready, I believe, according to the custom of bankers, to meet all the bills which were made payable there, without any specific direction with regard to each bill. That is to say, if bills are made payable at particular bankers and there is no countermand, and the bankers have assets of the acceptor, it would be their duty to pay the bills, just as much as it would be their duty to honour a cheque drawn by the acceptor on the same account, and they would be liable to serious damages if they improperly refused to pay. These moneys were partly paid, and it was intended they should be wholly paid, into the *Bank of England*, where the bills would have been met in due course on the day they became due, unless something had occurred to stop them.

It seems to me, therefore, that there was no breach of trust. There was money in the *Bank of England* ready and sufficient for the purpose. Then this occurred. One of the remittances from *Kelly & Co.* was, by a mere blunder of a clerk, paid into another banking account of *Smith, Fleming, & Co.* at the *London Joint Stock Bank*, which was their general banking account, and upon which that bank had a lien. In that state of things there came news of the failure of the *City of Glasgow Bank*, which was certain to bring down with it the house of *Smith, Fleming, & Co.* *Smith, Fleming, & Co.*, not being then aware of the mistake which their clerk had made, and being then perfect masters, so far as the bankruptcy law was concerned, of their own moneys, both at the

Bank of England and at the *London Joint Stock Bank*, wrote to *Kelly & Co.* thus: "We have paid the £5300 into the *Bank of England* according to your directions." I apprehend that was a payment which they were bound to make. They say, "We have got £5300" (as they thought they had) "in the bank," and, there being more than enough at the bank to meet the £5300, they say, "Well, even if we had been aware of the mistake of our clerk" (and not being willing to publish a mistake which their clerk had made) "it does not signify. The clerk paid this £2000 into the one bank; we will consider it as paid into the other bank, into which it ought to have been paid. We have balances at both, it does not signify to us where the two accounts are. We will consider that we have paid the £3500 into the *Bank of England*. But our lawyers have advised there is great difficulty about the matter. Of course we mean to be honest men; we have not appropriated the money, and we do not mean to appropriate it either for ourselves or for the other creditors. We mean to do that which we were told to do, and which we always intended to do with this money. There may be a difficulty about it in consequence of our position, and we immediately put the money aside for the purpose of meeting these bills." It appears to me that was not a thing forbidden by the law. Of course they could not have given the money to *Kelly & Co.*, because *non constat* that they would have taken up the bills, and *Kelly & Co.* had no right to have the money, except for the purpose of taking up the bills. Therefore, under the circumstances, the best thing they could do was to put the money into the hands of some third party and say, "We have received these moneys for this purpose. We have got them here, not mixed up in any way with our own moneys, and not converted into a debt by any breach of trust on our part. These are moneys which are available and ought to be used for that purpose, and we will put them into the hands of a third person to take up the bills." That being so, it appears to me that they were doing that which it was their duty as honest men to do. They were not precluded from doing it by any provision of the bankruptcy law. They were not making a preference in favour of any creditor. *Kelly & Co.* were not creditors; they were only persons who had a right to have the money applied in

C. A.
1879
Ex parte KELLY & Co.
In re SMITH, FLEMING, & Co.
James, L.J.

the specific way. It was applied substantially in the specific way, and this prevented a credit from ever arising by reason of a breach of trust which would constitute a debt. If the £5300 had been actually in the *Bank of England*, it appears to me there could have been no question about it. There seems to have been no question about the £3300 which was paid. I conceive that what was done came to this. Putting the money *in medio* did not amount to saying to the *cestuis que trustent*, "You have got a better claim to the money and can follow it, because it is ear-marked as trust money." That is not, as I understand it, the meaning of the letters which passed. As I understand it, the meaning was this: "We acknowledge your better right, if the law says that you have a better right." If they had a better right, they would be able to enforce it without any act on the part of the debtors. What the debtors meant to say to the persons to whom they transferred the £5300, as I understand them, was this: "Unless there is some provision in the law (as to which our lawyers and accountants have some doubt) which makes it wrong for us to do what we intend to do, you shall hold the moneys for the purpose of doing what we should have done but for the advice of our lawyers." It appears to me that they were not forbidden by the bankruptcy law from doing what they intended from the first to do with the moneys they received, and would have done if those moneys had been actually paid into the *Bank of England*. It seems to me there is nothing in the bankruptcy law to make it a fraudulent preference to correct the mistake which had been made by their clerk, of which they were only aware after they had actually drawn out the £5300 from the *Bank of England*, by taking money out of one pocket for the purposes of meeting something for which money in another pocket had been specifically appropriated, the money having got into that other pocket by mistake. There had been no misappropriation, no breach of trust intentionally committed, and therefore the relation of debtor and creditor never existed between them and *Kelly & Co.* in respect of the money, and it could not be said that they were doing anything with the intent of giving *Kelly & Co.* a fraudulent preference over their other creditors. They were merely doing that which it was their duty to do in complying with

the specific direction given to them as to the application of the money which they had received.

BAGGALLAY, L.J.:—

I concur with the views expressed by the Lord Justice, and have very little to add. If *Smith, Fleming, & Co.* had done nothing until the 5th of October, when the bills matured, and had on that day drawn £5300 from the *Bank of England* and taken up the bills, no question could have been raised as to the propriety of their so doing. Instead of doing that, they, on the 2nd of October, drew upon the *Bank of England* for £5300, and placed it in the *National Bank of Scotland* in the names of two of their partners, and immediately informed *Kelly & Co.* that they had done so for the express purpose of taking up the bills, and that the money was to be so applied if it lawfully could be. I quite agree with Mr. *Gardiner* that the contrivance was a clumsy one, as the thing might have been done in a much simpler way. But at the same time it appears to me that, had the funds so standing in the names of the two partners been applied on the 5th of October in taking up the bills, no objection could have been raised, and the sole object of placing the moneys there was that they should be so applied. I cannot see any distinction between the £3300 and the £2000.

BRAMWELL, L.J.:—

I am of the same opinion. The first question is, Does it make any difference that the £2000 was inadvertently paid into the *London Joint Stock Bank* instead of into the *Bank of England?* I cannot think that it was necessary that the specific money should be paid. I cannot think it was necessary that *Smith, Fleming, & Co.* should go to the *London Joint Stock Bank* and draw a cheque for £2000, the money which had been paid into that bank, and then possibly draw another cheque for £2000 on the *Bank of England* to pay into the *London Joint Stock Bank.* It was enough for them to get the money. As it seems te me, it was the same thing as if they had got the £5300 unappropriated at the *Bank of England.* They might in that case have intentionally paid the £2000 into the *London Joint Stock Bank,* instead

C. A. 1879

Ex parte Kelly & Co. *In re* Smith, Fleming, & Co.

of going through the idle form and ceremony of drawing two cheques upon the two banks. They might have done that lawfully, and surely that could make no difference. It seems to me that the case ought to be treated in just the same way as if they had paid the whole £5300 into the *Bank of England*. But Mr. *Gardiner* says that even if they had done so it would have been a breach of trust, and that they had no right to do it. But that was the very purpose for which the money was remitted to them, to pay it into the *Bank of England*, where the bills were made payable, and, if they did so, it seems to me that they performed the trust. I cannot think that the law is that the money cannot be followed and traced where there was what may be called a technical or formal breach of trust in not ear-marking the fund. I cannot but think that the *cestuis que trustent* would have the benefit of the money. According to Mr. *Gardiner's* argument the trustee has as good a title to the £3300 as to the £2000. I think he has. I think he is entitled to neither, because it seems to me that the debtors applied the money in the way in which it was intended that they should apply it. If they had allowed the £5300 to remain in the *Bank of England*, and the bills had been presented on the 5th of October, they would have been paid. But, knowing that there might be a difficulty in the account if they stopped, or that the bank might make some difficulty in paying the bills if they stopped before the bills were presented, they drew the money out, and, to the best of their ability, said, "We will perfect the conditions of the trust, and complete it as far as we can." I think, therefore, that the Appellants are entitled to have this £2000.

Solicitors for Appellants: *Phelps, Sidgwick, & Biddle.*
Solicitors for Trustee: *Lyne & Holman.*

Ex parte BANCO DE PORTUGAL. *In re* HOOPER.

C. A. 1879 April 3, 4.

Bankruptcy—Double Proof—Two Firms composed of the same Members—Bills drawn by one Firm on the other—Estate administered in different Countries—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 37.

In order that double proof may be admitted under sect. 37 of the *Bankruptcy Act*, 1869, it is necessary (just as it was under sect. 152 of the *Bankruptcy Act*, 1861) that there should be distinct estates to be wound up in bankruptcy.

Two firms, consisting of the same members, which carried on business, the one in *London* and the other at *Oporto*, became bankrupt. The Portuguese firm had drawn bills of exchange on the *London* firm, which the latter had accepted:—

Held, that the holders of the bills, who had received a dividend under the Portuguese liquidation, could not prove in respect of the bills in the *London* liquidation without giving credit for what they had received in *Portugal*.

Affirmed by H. of L. Stapl. Co. v. 161

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

J. K. Hooper and *J. K. Hooper*, the younger, carried on business in *London*, as wholesale wine and spirit merchants, under the firm of *Richard Hooper & Sons*, and also at *Oporto* in *Portugal*, as port wine shippers, under the firm of *Hooper Brothers*.

On the 14th of December, 1877, they filed a liquidation petition in the *London* Bankruptcy Court, and shortly afterwards judicial proceedings were taken in *Oporto*, according to the law of *Portugal*, for the liquidation of their affairs there.

The *Banco de Portugal* tendered a proof in the English liquidation for £4706 18*s.* 9*d.* in respect of five bills of exchange, which had been drawn by *Hooper Brothers* upon and accepted by *Richard Hooper & Sons*, and of which the bank were the holders for value. The bank had received under the distribution of the assets of the firm in *Oporto* a dividend of about 8*s.* in the pound upon the amount of the bills. Those assets had been distributed among the Portuguese creditors. The trustee admitted the correctness of the proof in point of amount, but refused to admit it otherwise than as a claim until the bank should have accounted for what they had received, or might thereafter be entitled to receive, for dividends payable under the Portuguese insolvency. The bank applied to the Court for an order that the trustee should admit

Appeal heard in order to see whether the documentary order below obtained affirmed 5 C.P.D. 14 & 1 C.A.

C. A. 1879

Ex parte BANCO DE PORTUGAL. *In re* HOOPER.

the proof unconditionally. The Registrar ordered that the proof should be admitted, but with the condition that the bank should not receive any dividend thereon until the other creditors had received a dividend equal to the dividend received by the bank under the liquidation in *Portugal*. His Honour was of opinion that the case was governed by the decision of the Court of Appeal in *Ex parte Wilson* (1). The bank appealed.

Cookson, Q.C., and *S. Woolf*, for the Appellants :—

The first question is whether we have really got bills of exchange. The Registrar held that the instruments which purport to be bills of exchange were in fact only promissory notes. But they were put forth as bills of exchange, and the persons who put them forth are estopped from saying that they are not bills of exchange: *Goodwin* v. *Robarts* (2); *Willans* v. *Ayers* (3); *Prince* v. *Oriental Bank Corporation* (4). *Miller* v. *Thomson* (5) is distinguishable.

Then, if the instruments are bills of exchange, sect. 37 of the Act permits double proof, for there are distinct contracts,—the contract with the drawers and the contract with the acceptors,—and there are distinct firms, though the individuals who composed the two firms were the same. It is not necessary under sect. 37 of the *Bankruptcy Act*, 1869 (6), as it was under sect. 152 of the *Bank-*

(1) Law Rep. 7 Ch. 490.
(2) 1 App. Cas. 476.
(3) 3 App. Cas. 133.
(4) Ibid. 325.
(5) 3 Man. & G. 576.
(6) Sect. 37 of the *Bankruptcy Act*, 1869: "If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts, against the properties respectively liable upon such contracts."

Sect. 152 of the *Bankruptcy Act*, 1861: "If any debtor shall, at the time of adjudication, be liable upon any bill of exchange or promissory note in respect of distinct contracts as member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader, and also as the member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in respect of such distinct contracts against the estates respectively liable upon such contracts."

ruptcy Act, 1861, that there should be "distinct estates to be wound up in bankruptcy;" those words have been omitted from sect. 37. That section speaks of the "properties respectively liable upon such contracts," and here there is property in *England* and property in *Portugal*, which is enough to satisfy the words of the section. Sect. 37 evidently contemplates the case of two firms composed of identical members, in which case there cannot be separate properties in the same sense as if there was only a common member of two firms. The difference between the two sections was considered in *Ex parte Honey* (1). *Ex parte Wilson* (2) was a decision upon sect. 152 of the Act of 1861, and does not now apply. Under sect. 37 of the Act of 1869 it is only necessary that there should be distinct contracts: *Lindley* on Partnership (3). In *Ex parte Stone* (4) the Court was only dealing with the question whether there were distinct contracts. It would be a fraud on the bank if they could not have recourse to both drawers and acceptors, and fraud enlarges the right of proof: *Ex parte Adamson* (5).

Sect. 37 is not a disabling section, and if we do not come within it we are equally not within the old law: *Goldsmid* v. *Cazenove* (6). The word "properties" is not the same thing as "estates." It may mean different properties, but forming part of one estate.

De Gex, Q.C., and *Finlay Knight*, for the trustee, were not heard.

JAMES, L.J.:—

I cannot draw any distinction between this case and *Ex parte Wilson*, which was decided by this Court, and, although I was one of the Judges who decided it, the decision is of course as binding upon us as any other judgment of the Court. That was a case perfectly analogous to the present, and the circumstances were very nearly the same. We then held that sect. 152 of the Act of 1861 could not apply unless where there were two estates to be wound up. But it has been said that those words in

(1) Law Rep. 7 Ch. 178.
(2) Ibid. 490.
(3) 4th Ed. vol. ii. pp. 1212, 1213.
(4) Law Rep. 8 Ch. 914.
(5) 8 Ch. D. 807.
(6) 7 H. L. C. 785.

C. A. 1879 *Ex parte* BANCO DE PORTUGAL. *In re* HOOPER.

sect. 152 have been left out of sect. 37 of the present Act. So they have, but they were left out by the draftsman because they were mere surplusage, and the enactment cannot, I think, be applied except where there are two estates. The only distinction, as I conceive, intended to be made, and the only distinction in fact made, between sect. 152 of the former Act and sect. 37 of the present Act, was, that while the former was confined entirely to bills of exchange and promissory notes, that limitation was left out of the present Act, and it was made to apply to any other contracts. The new law puts contracts which are not bills of exchange or promissory notes upon the same footing as bills of exchange or promissory notes. That was the only change, except an amendment of the language by making it shorter and terser. The word "properties" must be read "estates." I am not able to distinguish this case from *Ex parte Wilson* (1), and I think we must follow it, and hold that the bank are not entitled to prove in the English liquidation until they have brought into account what they have received from the same estate, or from part of the same estate, in another administration.

BAGGALLAY, L.J.:—

I am of the same opinion and for the same reasons.

BRAMWELL, L.J.:—

I am of the same opinion. I have a difficulty in seeing how sect. 37 applies. It is a provision for permitting, or rather for the non-prevention of, double proof in certain cases. I am fully sensible of the difficulty there is in the construction. It appears to me that in an unsupposable case, that of firms being in whole or in part composed of the same members, something is not to be prevented. It is, however, a provision for the non-prevention of double proof, and therefore it contemplates double proof, and, to my mind, contemplates that there must be two estates. It is manifest that the word "properties" in it must mean "estates." Now I agree with the opinion expressed by Lord Justice *Mellish* in *Ex parte Wilson*—at least I incline to it at the present moment

(1) Law Rep. 7 Ch. 490.

—that the two estates may be one in *England* and one abroad, as well as both in *England*; and I think it possible that the Legislature may have contemplated proof against an estate abroad and proof against another estate in *England*, but, to my mind, it must be another estate. I cannot understand how there can be two proofs unless there are two estates. Then Mr. *Cookson's* argument must come to this, that in truth there are two estates—a Portuguese estate and an English estate—and it is said there is a Portuguese estate because the Portuguese tribunal has divided the assets there as it has done. But I think that argument cannot be sustained, because, supposing there had been a surplus of the property in *Portugal*, it would have belonged to the trustee of the estate here. Another thing is equally manifest, that the Portuguese tribunal would have done the same thing if there had been only one contract, if, for instance, *Hooper Brothers* in *Portugal* had drawn upon *A. B.* in *London*, in which case there would have been only one contract. In such a case it is manifest that the Portuguese tribunal would have taken the property that was in *Portugal* and applied it in exactly the same way as they have done, and yet in that case there can be no doubt that the bank, subject to their allowing for everything they had received under the Portuguese law, would have had a right to prove against the English estate in respect of the drawee, although they had received money in *Portugal*. What is proposed now? That they shall prove against the same estate here. In respect of what? In respect of the indebtedness. I suppose it would be put upon that ground, treating it as though the bank had made a kind of proof and received a kind of dividend in respect of the drawee in *Portugal*. But that is not so. What the Portuguese tribunal does is, not to make, as it were, a separate estate, but to lay hold of what property they can get, and distribute it among the creditors there. It seems to me, therefore, that there are not two estates, one in *Portugal* and one here; consequently there is not a possibility of a double proof, and sect. 37 does not apply. I am further of opinion that *Ex parte Wilson* (1) is in point, and I am satisfied with the reasons for the decision there.

I should like to add one word about hardship, because although

(1) Law Rep. 7 Ch. 490.

C. A.
1879
Ex parte BANCO DE PORTUGAL. *In re* HOOPER.
Bramwell, L.J.

it is often said that we ought to decide a case irrespective of hardship (which is undoubtedly true), yet I think, as I have had occasion to say more than once, that when a particular construction of an Act of Parliament, or a particular proposition of law, leads to hardship, there is a presumption against that construction or proposition being right, because I do not think that our law does, usually at least, lead to hardship. There is, however, little or no hardship in this case. When people take a bill of exchange they take it on account of what they know of the parties to it, and it very rarely happens, I should suppose, that they say, "Here are half-a-dozen indorsements; that means half-a-dozen different firms, and some of them will pay if the others do not, and so altogether we shall get 20*s.* in the pound." That very rarely happens, but they take it upon the credit of the names that are known to them, and I have very little doubt that in this case the bank either knew that the partners in the drawing firm and in the accepting firm were the same, or, if they did not, they did not care whether they were the same or not. In either case no hardship is done to them.

Cookson, Q.C., asked for leave to appeal to the House of Lords.

THEIR LORDSHIPS gave leave.

Solicitors for Appellants: *M. Abrahams & Roffey.*
Solicitors for Trustee: *Loxley & Morley.*

REPUBLIC OF COSTA RICA *v.* STROUSBERG.

C. A. 1879 April 4.

[1879 C. 78.]

Practice—Interlocutary Order for Delivery up of Documents—Production of Documents before Delivery of Statement of Claim—Rules of Court, 1875, *Order* XXXI., *r.* 11.

Where the object of an action is to obtain delivery up of documents in the possession of the Defendants, the Court will not order them to be delivered up upon an interlocutory application before the Defendant has put in his defence.

Whether there is any general rule of practice that the Plaintiff cannot obtain an order for production of documents before he has delivered his statement of claim, *quære*.

THE action in this case was brought by the *Republic of Costa Rica* against *F. P. F. Strousberg*.

The writ was issued on the 17th of February, 1879, and the Plaintiffs therein claimed an account of all moneys received by the Defendant as agent and attorney of the Plaintiffs, for the purposes of or in connection with both or either of certain suits of the *Republic of Costa Rica* v. *Erlanger* and *Erlanger* v. *Republic of Costa Rica*, which were then pending in the Chancery Division, or for the purposes of any legal proceedings contemplated by a deed-poll under the hand and seal of Don *Francisco Yglesias* therein mentioned, and payment to the Plaintiffs of what should be found so due; and for an injunction to restrain the Defendant, his solicitors or agents, from parting with, otherwise than by delivery to the solicitors of the Plaintiffs, any of the deeds, documents, and papers then in his possession relating to the said two suits, and in particular any drafts or prints of the answer prepared on behalf of the Republic in the suit of *Erlanger* v. *Republic of Costa Rica*, and that the Defendant might be ordered to deliver up to the Plaintiffs' solicitors all such deeds, documents, and papers.

The Defendant *Strousberg* was formerly the agent of the Republic for the purpose of carrying on the above-mentioned suits; but the Republic had, in August, 1878, appointed a new agent. The Republic was now being pressed for their answer in *Erlanger* v. *Republic of Costa Rica*, and an order had been made for dismissing the original suit of *Republic of Costa Rica* v. *Erlanger*

C. A. 1879

REPUBLIC OF COSTA RICA v. STROUSBERG.

unless the answer was put in within a limited time, but, as they alleged, they were unable to put it in for want of the documents, and particularly the draft of the answer which had been prepared by *Strousberg* and printed, but never filed.

The Republic accordingly commenced the present action and at once obtained leave to give notice of motion for an injunction against the Defendant. The writ and notice of motion were served together at the Defendant's house at *Hendon*, under circumstances which Mr. Justice *Fry* held to be good service.

The motion was made before Mr. Justice *Fry* on the 27th of February, 1879. The Defendant did not appear, and the Judge made an order that the Court, being of opinion that the service of the writ and of the notice of motion was good service, ordered that the Defendant should be restrained from parting with the books, deeds, documents, and papers in his possession relating to the two suits of *Republic of Costa Rica* v. *Erlanger* and *Erlanger* v. *Republic of Costa Rica*, and in particular the drafts, proofs, or prints of the answer of the Republic in the second mentioned suit, except to the Plaintiffs; and that the Defendant should within ten days of the service of the order deliver to the Plaintiffs upon oath the deeds and documents before referred to, and that service of the order at the Defendant's residence, or at the office of a firm of solicitors therein mentioned, should be good service.

On the 13th of March, 1879, *Strousberg* moved in person before Mr. Justice *Fry* to discharge the order, on the ground that the service of the writ and notice was insufficient. But he declined to pledge his oath that he had not actually received the notice. The Judge refused the application with costs, and *Strousberg* appealed against both decisions.

J. Pearson, Q.C., *Locock Webb*, and *Medd*, for the Appellant:—

The only object of the action is to obtain the delivery up of those deeds and documents. The Judge has given the Plaintiffs on this interlocutory application all the relief sought in the action, before the Defendant has made his defence. This is entirely contrary to the practice of the Court: *Lingen* v. *Simpson* (1). There has been no alteration in this respect under the Judicature Acts. The Plaintiffs had not delivered their statement of claim

(1) 6 Madd. 290.

before making this motion, and before that is done the Court will not order an inspection of the Defendant's documents: *Cashin* v. *Craddock* (1); *Hancock* v. *Guerin* (2). The order is also wrong in not making the Plaintiffs give an undertaking as to damages: *Graham* v. *Campbell* (3).

Glasse, Q.C., *Kekewich*, Q.C., and *Giffard*, for the Plaintiffs:—

In substance the order is clearly right, for the Plaintiffs are entitled to an injunction restraining the Defendant from parting with the documents to any other person except the Plaintiffs. The fact that part of the order is mandatory makes no difference. The Plaintiffs are also clearly entitled to an order for production of the documents: *Beresford* v. *Driver* (4). Order XXXI., rule 11, is perfectly general; it enables the Court to order production "at any time during the pending of any action." The Defendant's relation to the Plaintiffs as their agent in the suit of *Erlanger* v. *Republic of Costa Rica* is not denied, and the affidavits shew that he has the draft answer which was prepared in that suit; and it is impossible for the Plaintiffs to put in their answer unless they get possession of this draft. All they want is inspection of the draft and the other necessary documents, and if the Court will not order them to be delivered up, we ask that the Plaintiffs may have the opportunity of inspecting and copying them. If that is refused, our suit against *Erlanger* will be dismissed. We believe that the Defendant is in collusion with *Erlanger*, and is intentionally obstructing us in our defence. With respect to the undertaking as to damages, the Defendant ought to have asked for it at the time when the order was made.

JAMES, L.J.:—

We do not trouble you, Mr. *Pearson*. Of course as to the injunction, that will remain. As to the undertaking, Mr. *Strousberg* ought to have asked for the undertaking at the hearing of the motion. With regard to the mandatory part of the order, I am sorry to say I think the Court has not jurisdiction to make it in this stage of the cause. It is a mandatory order; it is an order to deliver up the documents. It seems to me that all the injurious

(1) 2 Ch. D. 140.
(2) 4 Ex. D. 3.
(3) 7 Ch. D. 490.
(4) 14 Beav. 387.

C. A. 1879

REPUBLIC OF COSTA RICA v. STROUSBERG.

consequences suggested by the Plaintiffs may equally result from the conduct of anybody who retains property unjustly, to the great damage of his neighbour. The present order is, in truth, a judgment in an action of detinue made upon an interlocutory motion calling upon the Defendant to answer the claim made by affidavit. It appears to me that the practice of the Court does not authorize such an order. Our order will be without prejudice to any application which the parties may be advised to make, either for a receiver or production.

With regard to the special ground that is alleged, that is to say, the danger of having the bill in *Republic of Costa Rica* v. *Erlanger* dismissed by reason of collusion between Mr. *Strousberg* and Baron *Erlanger*, if what is stated in those affidavits be true, I should think the Vice-Chancellor would have no difficulty whatever in preventing *Erlanger* from getting any benefit from such collusion, or from the delay occasioned thereby; and beyond all question, speaking for ourselves, we shall take care, if those affidavits be true, that *Erlanger* gets no benefit, either by dismissing the bill or otherwise, from being in collusion with the agent of his opponents.

BAGGALLAY, L.J.:—

I have only one observation to make, and it is this. I desire to guard myself against expressing any opinion that there is no right, under the new Rules, to apply for the production of documents previously to the delivery of the statement of claim. Bearing in mind the decision of the Vice-Chancellor in the case of *Cashin* v. *Craddock* (1), I desire an opportunity of considering for myself whether I should take the same view as was taken by the Vice-Chancellor in that case. I think rule 11 of Order XXXI. is very wide.

BRAMWELL, L.J., concurred.

JAMES, L.J.:—

It is not a case in which any costs should be given. The costs will be costs in the action.

Solicitors: *Lee, Houseman, & Brodie; Freshfields & Williams.*

(1) 2 Ch. D. 140.

ATTORNEY-GENERAL *v.* BIPHOSPHATED GUANO COMPANY.

C. A.
1878
FRY, J.
Feb. 14, 22, 23.
C. A.
Dec. 6, 7, 9.
1879
March 2.

[1874 A. 101.]

Right of Way—Contract to dedicate to Public—Vestry—Purchaser for Value without Notice—5 & 6 Will. 4, *c.* 50.

In December, 1864, *B.*, who was in possession of land adjoining the River *Thames*, under an agreement for a lease for eighty years, gave notice to the Board of Works for the district that he desired to divert a public footway which crossed the land, and that he proposed to substitute a better footway, and also to make a new roadway to the water-side between two points specified, and throw the same open to the public. The vestry agreed to the application, subject to the proposed new roadway being made and thrown open to the use of the public, and the new footway being properly made. In April, 1865, the Justices made an order for the stopping up and diversion of the old footway. This was done by *B.*, and he also constructed the new road. The owners of the fee, however, did not give their assent, and there was, in the opinion of the Court, no sufficient evidence of any actual dedication of the way to the public. In May, 1866, a lease of the land to *B.* was executed, in which it was described as "All that piece of land, &c., as the same are more particularly delineated and described on the plan drawn in the margin hereof," and the habendum was made "subject to the existing rights of way over the said land." In the plan the new road was shewn, but was marked "Private road." There were other rights of way over the land. In June, 1866, *B.* assigned the lease for value to the *B. Company*, and there was nothing to shew that they had any notice of *B.'s* agreement, or of the existence of a right of way over the road, other than such notice as was given by the lease itself, there being, in the opinion of the Court on the evidence, nothing, in the appearance of the road or in the extent of its user by the public, to convey to a person inspecting the property any notice that there was a public right of way. After other assignments the lease became vested in *W.*, to whom the Defendants were tenants. In the sale plan, by reference to which *W.* purchased, the road was marked "private road," but appeared to terminate at the *Thames* at a point marked "Ferry from *Blackwall Stairs*." The Defendants stopped up the road. An information was filed by the Attorney-General, at the relation of the vestry of the parish, to restrain the Defendants during the remainder of their term from obstructing the road. The Defendants, by their answer, alleged that *W.* was a purchaser for value without notice of the agreement between *B.* and the vestry:—

Held, by *Fry*, J., that there was a valid contract between *B.* and the vestry for a license to the public to use the new road during his term, which the vestry could have enforced against *B.*, and that probably *W.* ought to be held to have purchased with notice of it; but that, looking at the lease and the plan together, no notice of the existence of a right of way over the

C. A.
1878
ATTORNEY-GENERAL
v.
BIPHOSPHATED GUANO COMPANY.

new road, was given to the *B. Company*, and that, as they had no other notice of its existence, they were purchasers of the lease for value without notice of the right of way, and therefore entitled to hold the property free from it, and that the Defendants, as claiming through them, stood in the same position, even if any of the intervening assignees had acquired the lease with notice of the right of way; and that the information must therefore be dismissed.

Held, on appeal, that, as the Defendants had not by their answer alleged that the *B. Company* had no notice of the right of way, they could not avail themselves of the defence that the *B. Company* were purchasers for value without notice; but that the defence that *W.* was a purchaser without notice was sustained, there not being enough on the sale plans to affect him with notice that there was a public right of way; and that, therefore, assuming the existence of an agreement which could have been enforced against *B.*, it could not be enforced against the Defendants.

THIS was an information by the Attorney-General, at the relation of the vestry clerk of *East Greenwich*, and a bill by the vestry clerk as Plaintiff, and it prayed for an injunction to restrain the Defendants from obstructing the public in the free use of a road leading to the River *Thames* across land in the occupation of the Defendants.

In March, 1864, the trustees of *Morden College*, who were the owners in fee of the land in question, which was marsh land adjoining the River *Thames*, and situate in the parish of *East Greenwich*, agreed to grant a lease of it to Captain *Blakely* for a term of eighty years from the 25th of March, 1864. At the time when this agreement was entered into there were two public footways crossing the land. Captain *Blakely* entered into possession of the land, which he had taken for the purpose of erecting a factory on a part of it, and being desirous of diverting one of the footways which crossed the site of the intended factory, he, on the 14th of December, 1864, served a notice in writing on the Board of Works for the *Greenwich* district, as the surveyors of highways in the parish of *East Greenwich*, stating his desire and that he proposed to substitute a shorter and better footway, as shewn on an accompanying plan, for so much of the old footway as was proposed to be stopped up and diverted, and further that he proposed and intended, if the old footway were stopped up and diverted, to give and make a new roadway to the water-side, forty feet in width, between the places marked D and E respectively on the plan, and to throw the same open to the public.

At a meeting of the vestry of the parish, held on the 23rd of December, 1864, this application was considered, and the vestry resolved, "subject to the proposed new roadway to the water-side, from the place marked D on the plan now laid before this meeting and accompanying the present application to the place marked E on the same plan, being properly formed and substantially made, forty feet in width, and thrown open to the use of the public, with free access to and from the River *Thames* to the full extent of the said width of forty feet," and subject to the new footway being also made in a proper and substantial manner, to the satisfaction of the District Board of Works, to agree to the application. Application was then made to the Court of Quarter Sessions, and they, on the 6th of April, 1865, made an order that the footway should be stopped up and diverted in the way proposed. Captain *Blakely* afterwards stopped up and diverted the footway, and made the new footway, and he also constructed the new road between the points D and E. The bill alleged that Captain *Blakely* "threw open and dedicated such new road to the public as he had agreed to do, and the said new road was thenceforth, that is to say, from the year 1865, used by the parishioners of the parish of *East Greenwich* and by the public generally as a public highway to and from the River *Thames* without interruption, until it was obstructed and blocked up by the Defendants."

The Court, however, held upon the evidence that the user of the road was not of such a nature as necessarily to convey to any one who inspected the property, notice that the road was a public one, but that, on the contrary, the user was consistent with its being only a limited user with the tacit consent of the owner of the land. After the footpath had been stopped up and diverted, and the new road made by Captain *Blakely*, the trustees of *Morden College* executed a lease of the property to him, dated the 14th of May, 1866. In this deed the demised property was described as "All that piece of land, &c., together with the several messuages, &c., thereon erected and built, as the same are more particularly delineated and described in the plan drawn in the margin hereof," and the habendum was made "subject to the existing rights of way over the said land." In the plan the new road was shewn,

C. A. 1878 ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY.

but it was marked "Private road." On the plan was also shewn another road, extending from the point D to a point marked A in a road called "*Blackwall Lane*," and there was this note in the corner of the plan: "the road from A to D to be used in common with the trustees' tenants."

In June, 1866, Captain *Blakely* assigned the lease to the *Blakely Ordnance Company*, who, on the 10th of October, 1870, assigned it to the *Agra Bank* and *Wilkinson Dent* as tenants in common. On the 19th of December, 1872, the *Agra Bank* and *Dent* assigned the lease to *Christopher Weguelin*. The Defendants were in possession of the property as tenants of *Weguelin*. It was not proved that the *Blakely Ordnance Company* had any notice of *Blakely's* agreement with the vestry to make the road, or any notice of the existence of a right of way over it other than such notice as was given by the lease itself and the actual user of the road. The Defendants had placed an obstruction across the road at the point D.

The information prayed that the Defendants might be restrained during the remainder of their term from obstructing the new road from D to E.

The Defendants, by their answer, alleged that *Weguelin* was a purchaser for value of the property without notice of the existence of the alleged right of way over the new road, but did not allege absence of notice to the *Blakely Ordnance Company*. The Plaintiff and informants ought to fix *Weguelin* with notice, on the ground that the plan produced at the auction at which he purchased, and by reference to which he purchased, shewed the road in question as terminating at the River *Thames*, at a point marked "Ferry from *Blackwall Stairs*." It appeared, however, that no ferry really existed there, and that the road in question was marked on the plan as being a private road.

The action came on for trial before Mr. Justice *Fry* on the 14th of February, 1878.

North, Q.C., and *Speed*, for the Relator and Plaintiff:—

There has been a dedication of the road to the public, or at any rate there is a valid contract to give a license to the public to use the road during the term, and the Court will enforce the performance of the contract by injunction.

Fischer, Q.C., *Patchett*, Q.C., and *Kingdon*, for the Defendants:—

There could be no dedication of the road to the public except with the consent of the reversioners: *Wood* v. *Veal* (1); and the alleged user comes to nothing more than a permissory user. And if the case is rested on contract our answer is twofold: 1, that there was no valid contract; 2, that we are purchasers for value without notice. As to 1, the vestry had no power to make such a contract; they could only assent to the proposed diversion, and could not impose other conditions on the person applying to them. They could not throw on the parish the obligation of repairing the road; that would be *ultrà vires:* 5 & 6 Will. 4, c. 50, s. 23. Again, there can be no dedication of a way to the public for a limited time: *Dawes* v. *Hawkins* (2).

[FRY, J.:—The question is, whether the vestry can contract for a right of way for a limited time.]

Such a contract would be bad. At any rate, there is nothing more than a revocable license: *Wood* v. *Leadbitter* (3). No valid title could be given, as the reversioners were not bound: *Bright* v. *Walker* (4).

[FRY, J., referred to *Vestry of Bermondsey* v. *Brown* (5).]

Captain *Blakely* was not bound by his offer; it was not the consideration for the consent of the vestry to the diversion of the footway. There has been no sufficient part performance. The only part performance has been by the party to be charged: *Caton* v. *Caton* (6).

[FRY, J.:—Possession is part performance as against either side: *Wilson* v. *West Hartlepool Railway Company* (7).]

As to 2, the words of the lease, taken in conjunction with the plan, do not amount to notice of the existence of a right of way over the new road. The plan, which is part of the lease, negatives the existence of any public right of way over the new road, and therefore the *Blakely Company* were not bound to inquire whether there was any such right over it: *Jones* v. *Smith* (8). It is not

(1) 5 B. & A. 454.
(2) 8 C. B. (N.S.) 848.
(3) 13 M. & W. 838.
(4) 1 C. M. & R. 211.
(5) Law Rep. 1 Eq. 204.
(6) Ibid. 1 Ch. 137.
(7) 2 D. J. & S. 475.
(8) 1 Ph. 244.

C. A. 1878 — ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY.

proved that the *Blakely Company* had any actual notice of the contract with the vestry, and there is nothing in the user which has been proved inconsistent with its being a merely permissory user. The *Blakely Company* were therefore purchasers for value without notice of any right of way, and could convey an equally good title to their assignees.

Speed, in reply:—

The alleged contract is plainly proved.

[FRY, J.:—The substantial question is that of notice.]

The plan shews a broad road, and the words of the habendum ought to have put the purchaser on inquiry. A private roadway may have rights of way over it. At any rate, *Weguelin* had notice of the right of way upon his purchase, and that is enough to bind the Defendants. Moreover, the Defendants take an interest under the identical lease to *Blakely;* their title is not an independent one. They must stand in the same position as he did.

FRY, J.:—

The information and bill is filed for the purpose of enforcing an agreement entered into between Captain *Blakely* and the vestry of *East Greenwich*.

Now the first question in controversy is, whether the notice and the resolution of the vestry and the order of the Quarter Sessions amounted to a valid contract between the vestry and Captain *Blakely* that he should form the road and dedicate it to the public. In my opinion they did. I think that there was a contract which might have been enforced against Captain *Blakely*, and against every person who took the land, to a lease of which he became entitled under the agreement of March, 1864, with notice of that contract.

It appears that shortly after the date of the contract Captain *Blakely* made the road, and that it was from time to time used to some extent by persons who landed at the end of it next the river, and passed up it to a footpath with which it communicated. The only question I have to consider is whether the Defendants are entitled to say that they are purchasers for value without

notice. The first step in that inquiry arises on the lease of the 14th of May, 1866, whether from it every subsequent purchaser must be deemed to have had notice of the existence of a right of way over the road. Now the habendum of the lease is "subject to the existing rights of way over the said land," and, if the matter had stopped there, I should have held that every person whose title was derived under the lease was bound to make this inquiry, What were the rights of way over the land existing on the 14th of May, 1866? And, whether they made the inquiry or not, they would be affected with notice of that which they would have discovered if they had made it. But it appears that the demised premises were described in the lease as "a piece or parcel of marsh land, together with the messuages and buildings thereon erected, as the same are more particularly delineated and described in the plan drawn in the margin hereof," and when I look at the plan drawn in the margin, I find that the road dealt with by the contract of 1865 is shewn, but it is described as a "private road." Now, the effect of that description seems to me to be this. It says to everybody who looks at the deed and the plan, Although you will find a road physically existing upon the land, that road is a road only for the use of the owner of the estate, and no third person has any right of way over it. They say, in short, Although there are, or may be, existing rights of way over the land, there is no existing right of way over that road; that road is for the use of the owner of the land, it is free from any right of way in any other person; it is private. "Private" implies that no one else has any right over it. It is further to be observed that, according to the case both of the Plaintiff and of the Defendants, other rights of way over the land existed at that time. There was the footway which had been diverted under the agreement of 1865, and there was another. Therefore, there was enough to satisfy the words in the lease, "subject to the existing rights of way." It seems to me that the lease did not convey any notice of any right of way existing under this contract. On the contrary, it negatived the existence of any such right of way.

Of course Captain *Blakely*, the original lessee, could not be heard to say that he had not notice of the contract, because he

C. A. 1878

ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY.

Fry, J.

was a party to it. But in June, 1866, he assigned the lease to the *Blakely Ordnance Company*. Is there, then, any evidence to shew that the *Blakely Ordnance Company* took the lease with notice, either of the contract or of an existing right of way? With regard to the contract there is not a tittle of evidence to shew that they knew anything about it. With regard to the existence of a right of way in the public, there is this, that undoubtedly at that time persons occasionally used the road, but upon the whole of the evidence I come to the conclusion that the user was not of such a description as would necessarily bring to the mind of a person who inspected the property the knowledge that there was a public highway.

There is no evidence therefore to shew that the *Blakely Ordnance Company* took the lease from Captain *Blakely* with any actual notice of the contract, or of the existence of a right of way. The same observation applies with regard to the assignment by the *Blakely Company* to the *Agra Bank* and Mr. *Dent*. When I come to the assignment by the *Agra Bank* and *Dent* to *Weguelin*, the matter is no doubt in a somewhat different position, and I am not prepared at the present moment to say that he might not have notice of the existence of a right of way over the road. But that appears to me to be immaterial, and for this reason: I conceive that when *A.* buys without notice and sells to *B.*, who has notice, *B.* can hold free of the notice. That is well ascertained law with regard to mortgages, and if it applies to one kind of incumbrance it must equally apply to another kind of incumbrance. The reason of that law is evident. If it were not so, the right of the person who purchased without notice would be limited, for his market would be limited. That is the general principle of law, and therefore it is immaterial for me to determine whether Mr. *Weguelin* had or had not notice, and, if he was entitled to hold the property free of the notice, it follows that the Defendants, who claim title through him, are equally entitled to do so.

In the result I hold that, although there was a contract which might have been enforced against Captain *Blakely*, it cannot be enforced against the Defendants, because they are purchasers for value without notice.

I therefore give judgment for the Defendants, with costs.

The Plaintiff appealed. The appeal came on for hearing on the 6th of December, 1878.

Bagshawe, Q.C., *North*, Q.C., and *Speed*, for the Appellant:—

There is sufficient evidence of a dedication to the public by the termor, and the dedication is sufficient though the parish has incurred no liability to repair, and the public have not taken to the road: 5 & 6 Will. 4, c. 50, ss. 23, 84, 85; *Roberts* v. *Hunt* (1); *Dovaston* v. *Payne* (2); *Reg.* v. *Wilson* (3).

[JAMES, L.J.:—Can a termor dedicate?]

There is no ground of principle why he should not, though the dedication would not be good as against the owner of the fee, and there is no decision that he cannot, though there are some *dicta*: *Wellbeloved* on Highways (4); *Wood* v. *Veal* (5); *Rex* v. *Barr* (6); *Dawes* v. *Hawkins* (7): the last of which cases only, in fact, goes to this, that the owner of the fee cannot dedicate for a limited period. *Mercer* v. *Woodgate* (8) shews that there may be a qualified dedication. But if the Court is against us on the ground of legal dedication, we rely on the agreement with Captain *Blakely*. The circumstances affect *Weguelin* with notice on his purchase. The Court below was in our favour on this point, and decided against us only on the ground that the *Blakely Company* had no notice; but the Defendants cannot avail themselves of that defence, for they have not pleaded it: *Phillips* v. *Phillips* (9). There was notice also on the principle of *Daniels* v. *Davison* (10), according to which, in *Hervey* v. *Smith* (11) and *Davies* v. *Sear* (12), it was held that the existence of a structural erection was notice of a right to use it. So here the existence of a made road was notice of the rights over it. *Oldfield* v. *Round* (13) confirms this.

Fischer, Q.C., *Patchett*, Q.C., and *Kingdon*, *contrà*:—

On the evidence, there was in point of fact no dedication. A

(1) 15 Q. B. 17.
(2) 2 Sm. L. C. 136, 147.
(3) 18 Q. B. 348.
(4) Page 59.
(5) 5 B. & A. 454.
(6) 4 Camp. 16.
(7) 8 C. B. (N.S.) 848, 858.
(8) Law Rep. 5 Q. B. 26.
(9) 4 D. F. & J. 208.
(10) 16 Ves. 249; 17 Ves. 433.
(11) 1 K. & J. 389; 22 Beav. 299.
(12) Law Rep. 7 Eq. 427.
(13) 5 Ves. 508.

C. A. 1878 — ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY.

dedication by the lessee, even if in fact made, would be void: *Wood* v. *Veal* (1), there being no evidence of any assent by the owners of the fee. There is no case in the books where a dedication by a termor has been held good even as against him. There was no agreement that could be enforced. Captain *Blakely* agreed to dedicate a road, and no doubt found that he could not do it, so the scheme was abandoned. If the Court is of opinion that want of notice is not sufficiently pleaded, we ask leave to amend.

[JAMES, L.J.:—That would lead to a new trial with a fresh examination of witnesses.]

Bagshawe, in reply.

1879. March 22. The judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) was now delivered by

THESIGER, L.J., as follows:—

The Defendants to this information and bill are the occupiers of lands situate in the parish of *East Greenwich*, under an agreement for a lease made between one *Christopher Weguelin* and certain persons carrying on business as guano merchants under the firm name of Messrs. *Mockford & Co.*, and the benefit of which agreement was in November, 1873, transferred by *Mockford & Co.* to the Defendants. *Weguelin* himself was entitled to the lands as assignee from the *Agra Bank, Limited*, and *Wilkinson Dent* of a lease dated the 14th of May, 1866, by which the trustees of *Morden College* let the lands to *Theophilus Alexander Blakely* for eighty years from the 25th of March, 1864. That lease was assigned by *Blakely* to a company called the *Blakely Ordnance Company, Limited*, and by that company to the *Agra Bank* and *Dent*. The object of the information and bill is to restrain the Defendants from obstructing a certain road made upon the land occupied by the Defendants and communicating at one end with the River *Thames* and at the other with a public footpath, and which road, it is alleged, is either a public highway or a road which the Defendants, by virtue of their privity in estate with

(1) 5 B. & A. 454.

Blakely, the original lessee, are bound by agreement to keep open to the public. Upon the hearing before Mr. Justice *Fry* he decided,—first, that there had been no dedication of the road to the public; and, secondly, that, assuming an agreement such as was alleged between the vestry of *Greenwich* and *Blakely* to have been proved and to be valid, it could not be enforced against the Defendants, on the ground that neither the *Blakely Ordnance Company* nor the *Agra Bank* and *Dent* were affected with notice of the agreement, and, consequently, that *Weguelin*, even if he himself had notice, took his assignment unfettered by the agreement. Judgment was accordingly given for the Defendants. Upon the appeal it has been objected by the Appellants that, looking to the pleadings, the fact of notice was not put in issue by the Defendants except as regards *Weguelin*, and that the learned Judge was not justified in deciding the case upon the want of notice to persons prior in title to *Weguelin*. We are of opinion that this objection is a well-founded one. The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it. In this case, on the contrary, the defence, as alleged by the answer, is strictly confined to *Weguelin's* want of notice, and, while *Weguelin* himself made an affidavit in verification of the defence, no attempt was made on the part of the Defendants to carry their evidence further. The objection, too, is one of substance, for the absence from the pleadings of any issue as to notice, except as regards *Weguelin*, would naturally put the informant and Plaintiff off their guard and prevent their offering any evidence beyond that bearing on the question raised by the pleadings; and, indeed, it would appear that the evidence in relation to this point was limited on both sides to the question so raised. But although we think that the particular grounds taken by the learned Judge upon this part of the case were not properly open to him, we are of opinion at the same time that his judgment on this branch of the case may be supported upon the ground of want of notice to *Weguelin*. The way in which it is attempted to affect him with notice is by shewing that upon the plan prepared for the sale by auction, by reference to which he purchased, the road in question appears as terminating at the River *Thames* at a point marked "Ferry from

C. A. 1879

ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY.

Blackwall Stairs," and it is contended that this indicated to all intending purchasers that the road leading to the river was in whole or in part a public one. But the answer to this contention is, first, that no ferry, in the legal sense of the term, existed, and no regular ferry, in the popular sense of the term, really existed; and, secondly, that the road, a part of which is claimed as public, is marked generally in the plan as a private road, and, consequently, there is nothing to indicate to a purchaser anything more than that a private road existed, and that persons entitled to use it might be ferried across the river to and from *Blackwall*. We would add, that the lease to *Blakely*, if inspected by the purchaser, would give still less indication of any public right having been created over the road in question, for upon the plan attached to that lease the very part of the road claimed as public has written upon it the words "private road." Consequently, although the lease was made subject to all rights of way, and a purchaser might be held affected with notice of ways not shewn on the plan, but really existing, he could hardly be said to be affected with notice that a road which at the date of the lease was a mere paper road, and was marked on the plan as private, was in fact public. As, then, we are of opinion that Mr. *Weguelin* was a purchaser without notice, it becomes unnecessary to consider whether or not the vestry of *Greenwich* were competent to contract, and did in point of fact and law contract, with Captain *Blakely* for the formation by him of the road in question.

But the question remains, was there a dedication of the road to the public? for if so, the public are entitled to have it kept open against all persons, whether they took with notice of the existence of the highway or not.

This question appears to have been almost passed over in the Court below, where the agreement was made the foundation of the present Appellants' claim, and the subject of the learned Judge's decision. In this Court it has formed the prominent feature of discussion, and being sufficiently, although not very definitely, raised by the pleadings, must be decided upon. The argument has raised an important point of law with reference to the power of a lessee to dedicate, at least as against himself and his assignees, a highway to the public; but that point can only, as a matter of

necessary decision, arise after the Court is satisfied that the evidence establishes such conduct on the part of the lessee on the one hand, and the public on the other, as would, if the lessee were an owner in fee, amount to proof of dedication in fact. We proceed, therefore, to consider the evidence, but before doing so will first call attention to the allegations of the parties in their respective pleadings.

[His Lordship here read the allegations in the information and bill, the material part of which is set forth in the second paragraph of the report, and a clause from the answer of the Defendants, in which they denied that Captain *Blakely* did in fact throw open or dedicate the new road to the public, or that the road had, from 1865 or from any other time, or in fact been used by the parishioners of *East Greenwich*, or by the public generally, as a public highway to and from the River *Thames*, until it was obstructed by the Defendants; and alleged that no road other than a private road had ever existed over the property.]

These being the allegations of the parties, the evidence for the informant and Plaintiff was as follows:—

In the first place, the proceedings between Captain *Blakely* and the vestry of *Greenwich* in 1864 were proved, and from those proceedings it appears that in the clearest and most unmistakable terms Captain *Blakely*, as an inducement to the *Greenwich* vestry to consent to the deviation inland of a public footpath which ran along or near to the bank of the River *Thames*, stated that he proposed and intended, if the old footway were stopped up and diverted in another line proposed by him, to give and make a new roadway to the water-side forty feet in width between the places marked with the letters D and E respectively on a certain plan referred to, and to throw the same open to the public. The vestry, in equally clear and unmistakable terms, made their assent to the proposed diversion of the old footway, subject to, amongst other things, the proposed new roadway being formed and thrown open to the public, with free access to and from the River *Thames* to the full extent of the said width of forty feet. This fact is undoubtedly a most important starting point for the Appellants. It establishes at the very least a moral obligation upon Captain *Blakely* to make and throw open to the public the road in question, and it indicates

C. A. 1879 ATTORNEY-GENERAL v. BIPHOSPHATED GUANO COMPANY.

in the strongest manner that could well be conceived the existence on his part at that time of the *animus dedicandi*. It tends, therefore, to strengthen and give point and force to any evidence of user by the public of the road when made. But it must not be pressed too far. The public were not, and could not, be parties to the bargain. The making of the road, though an inducement to the vestry to consent to the diversion of the footpath, was not and could not, looking to the provisions of the *Highway Act* (5 & 6 Will. 4, c. 50), be made a condition of such diversion. The arrangement was not even before the Court of Quarter Sessions, which, under the *Highway Act*, had to approve, and did approve, of the diversion solely upon the consideration of the advantages of the substituted footpath, and those advantages the public have obtained. The bargain between Captain *Blakely* and the vestry may in short explain doubtful acts, but it cannot remove the necessity of proof that the road in question has been in fact thrown open to the public and used by them, for without such proof the existence at one time of the *animus dedicandi*, however clearly established, can lead to no inference of a dedication.

[His Lordship, after examining the evidence, continued:—]

The result of the evidence fully accounts for the little reliance placed in the Court below upon proof of any dedication to the public. We cannot think that, giving the fullest weight to the intention to dedicate evinced in 1864, when the arrangement with the vestry was made, it is reasonable to hold, upon such vague and unsubstantial evidence as that adduced on the part of the Appellants, that such intention was actually carried out. In order to constitute a dedication binding upon the owner of the land, it is not necessary to prove that the parish in which the road alleged to be dedicated is situate has taken to the road so as to be liable to repair it; but, looking to the importance attributed in 1864 to the promised road by the vestry of *East Greenwich*, an additional argument against any dedication having existed in the present case is to be found in the fact that after 1864 the parish had never repaired or interfered in any way with, and, as far as is shewn by the evidence, never raised in any shape or form the question of the road which their officer now claims for the public. The affidavits filed on behalf of the Defendants explain the character

of such user as there has been of any way from the *Thames* over the Defendants' land, and further strengthen the view that neither as regards the certainty of the way used or the persons using it has there been any such user as is properly required to create a public right of way. Such rights have been held in some cases to have been acquired by user of not many years' continuance; but in those cases the way itself has been clearly defined, and the character of user left no doubt as to the intention to dedicate by the owner of the land over which the way ran, and the assertion of right on the part of the public; but here everything is left vague and uncertain; time, place, termini, extent of user, persons using, and all matters requiring clear proof, are either scarcely proved at all or are even proved in a manner unfavourable to the inference of the existence of a public right, and we are of opinion that the Appellants have failed to make out any title to relief, and that the appeal should be dismissed with costs.

Solicitor for Plaintiff: *W. Bristow.*
Solicitor for Defendants: *Mark Shephard.*

In re DAVIDSON.
MARTIN *v.* TRIMMER.
[1876 D. 129.]
DAVIDSON *v.* TRIMMER.
[1876 D. 135.]

Reconversion—Election to take Property in its actual state.

The *H. P.* estate was vested in *H.*, *D.*, and *S.*, upon trust after the death of a person who died in August, 1863, to sell with all convenient speed. The proceeds of sale belonged as to one moiety to *D.*'s wife absolutely for her separate use, subject to a charge of £500 to a legatee, and as to the other moiety to *S.* absolutely. The property was well adapted for building purposes, but the bulk of it was subject to an old lease of which twenty-six years were unexpired. In March, 1864, *D.* and wife paid off the £500. In 1864, the three trustees let for three years part of the property not comprised in the old lease, and in 1867, and again in 1869, *D.* and *S.*, who had survived *H.*, granted similar leases for three years. In 1865, *S.*, who was the acting trustee and managed the property, had plans prepared by a surveyor for laying out the property for building. In the same year a bill was brought

C. A.
1879
In re DAVIDSON.
MARTIN *v.* TRIMMER.
DAVIDSON *v.* TRIMMER.

into Parliament for authorizing a railway to pass through the estate, and a petition against it was presented on behalf of "the owners and trustees of the *H. P.* estate," which stated that it was their intention to lay out the estate for building. Mrs. *D.* died in 1870, in the lifetime of her husband. There was no direct evidence that she had concurred in the leases, the preparation of the plans, or the petition to Parliament:—

Held, that the parties had elected to take the property as real estate, and that Mrs. *D.*'s share went to her heir-at-law as realty, and not to her husband as personalty.

BENJAMIN HOPKINSON, by will, dated the 26th of March, 1821, devised his real estate at *Highbury* to the use of trustees in fee, upon trust that during the lives and life of his two daughters, *Mary Stones* and *Isabella Sotheby*, and the survivor of them, they should stand seised of the premises upon the trusts thereinafter declared, and should "with all convenient speed" after the decease of the survivor of the two daughters sell the property and invest the proceeds as therein mentioned, with power to vary securities; and should stand possessed of the trust fund and the income thereof, and of the rents, issues, and profits of the estate during the lives and life of his two daughters and the survivor of them, and until the sale upon trust for the said two daughters *Mary* and *Isabella* during their respective lives in equal shares as tenants in common, for their separate use respectively, with a restraint on anticipation. And after the decease of each of his said daughters he directed that his trustees or trustee should stand possessed of one undivided half share of the trust fund and the income thereof, and of the rents and profits of the estate until sale, in trust for all or such one or more of her issue, whether children or grandchildren, and in such manner as she should by deed or will appoint, and in default of and until such appointment and so far as no such appointment should extend, in trust for such child or children of hers as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, and if more than one, in equal shares.

The testator died in 1821, leaving both his daughters surviving him.

Isabella Sotheby died in 1859, without having exercised her power of appointment. She had one child only, *Hans William Sotheby*, who was born in 1827.

Mary Stones, by deed-poll, dated the 14th of March, 1859, appointed that £500 should as soon as conveniently might be after her decease be levied and raised out of the moiety or equal half part to the rents and profits of which she was entitled for her life in the *Highbury* estate, or from and out of the moneys to arise from the sale thereof, and should belong to her grandson *W. L. Collins*, and carry interest from her death, and that subject to the payment of the £500 and interest, the said moiety of the *Highbury* estate or the moneys to arise from its sale and the funds on which they should be invested, should belong to her daughter *Isabella*, the wife of *Thomas Davidson*, her heirs, executors, and administrators, for her own sole and separate use. And it was declared that the above appointments were subject and without prejudice to the payment to Mrs. *Stones* during her life of the rents and income to which she was entitled under the will.

Mrs. *Stones* died on the 25th of August, 1863.

At the time of the death of Mrs. *Stones* the trustees of the will were *William Hopkinson*, the testator's son-in-law *Thomas Davidson*, and the above-named *Hans William Sotheby*. As appears from the above statement the moneys to accrue from the sale of the estate belonged in moieties to *Hans William Sotheby* and Mrs. *Davidson* for her separate use without restraint on anticipation, subject only to the £500 payable out of Mrs. *Davidson's* moiety to *W. L. Collins*.

On the 16th of March, 1864, *Thomas Davidson* paid the £500 to *W. L. Collins*, who thereupon executed a deed releasing Mrs. *Davidson*, her heirs, executors, and administrators, the trustees of the will, and Mrs. *Davidson's* moiety of the *Highbury* property, from the £500 and all claims in respect thereof.

Mrs. *Davidson* died intestate, on the 7th of December, 1870, leaving her husband surviving her, and leaving an only son, *Thomas William Davidson*. The question now was whether at the time of Mrs. *Davidson's* death the *Highbury* estate, which had not been sold, was still subject to the trust for sale so as to devolve as personalty.

The circumstances upon which the arguments turned were as follows:—

The *Highbury* property consisted of a messuage and eleven acres of land let in 1814 for a term expiring in 1889 at a rent

C. A. 1879 *In re* DAVIDSON. MARTIN *v.* TRIMMER. DAVIDSON *v.* TRIMMER.

of £200, and two other messuages known as *Vine Cottage* and *Highbury Park Dairy*. At the death of Mrs. *Stones* the *Dairy* was in the occupation of a yearly tenant at a rent of £45. In April, 1864, the three trustees let *Vine Cottage* for a term of three years. In April, 1867, *T. Davidson* and *Sotheby*, the surviving trustees (*Hopkinson* having died in 1866), let it for three years to another tenant, who left in 1869, and in that year they let it again for three years to another tenant who (under what circumstances did not appear) never entered into possession, and in the latter part of the same year they let both *Vine Cottage* and the *Dairy* for three years to another tenant, who continued in the occupation of the premises up to the time of these proceedings.

Sotheby was the acting trustee, and during the interval between the deaths of Mrs. *Stones* and Mrs. *Davidson* the rents were received by him in person, or, when he was absent from *England*, by his solicitors, and one-half paid to Mrs. *Davidson*.

Upon the death of *Isabella Sotheby*, *Hans W. Sotheby* paid succession duty on one moiety of the estate. On the death of *Mary Stones* a succession duty account in respect of the other moiety was made out and signed by Mr. and Mrs. *Davidson*. The Commissioners of Inland Revenue declined to receive it, and claimed legacy duty, which in June, 1865, was paid by *Thomas Davidson* and *Sotheby*, as surviving trustees, on the whole value of the estate, which, by agreement with the Commissioners of Inland Revenue, was assessed at twenty years purchase.

It did not appear that the property had ever been offered for sale; nor, on the other hand, was there any evidence of any agreement to retain it in the shape of realty.

Mr. *Davidson* had since died, and his estate being in course of administration by the Court, the question arose whether the share of Mrs. *Davidson* in the testator's real estate formed part of Mr. *Davidson's* estate as personalty or had descended as realty to Mrs. *Davidson's* heir-at-law.

The action came on for trial before Vice-Chancellor *Hall* on the 16th of April, 1878.

Graham Hastings, Q.C., and *Manby*, for the heir-at-law of Mrs. *Davidson*.

Bristowe, Q.C., and *Chapman Barber*, for the legal personal representative of Mr. *Davidson*.

HALL, V.C.:—

It appears to me that there is a feature in this case which does not exist in any of the cases which have been referred to, namely, that this property was not held in its entirety by one person, but was held in undivided shares. That is a very important feature, because where the property is held in undivided shares you must have clear evidence as to all the parties interested in the undivided shares concurring in its being taken in its then state, and not in the state into which it would be brought by the performance of the trust. In this particular case one of the parties was entitled to the undivided moiety now in question as personal estate for her separate use. She was under coverture; and, as I collect, the acts done with reference to it were all the acts of her husband, with the exception of one formal act of her signing a succession duty paper, which was treated afterwards as being inoperative, and with the further exception that the sum of £500 charged upon Mrs. *Davidson*'s moiety of her property was, as I collect from the deposition, paid by a cheque of her husband's, but though paid by a cheque of the husband's was paid in reality out of her moneys. I think this is the fair inference, that she being entitled to this share, the property not being converted, though she was entitled for her separate use, she never gave her husband any control, or did any act to vest any property in him during the coverture in respect in any way of the corpus of her interest; but what she probably did was that she allowed her husband to receive her income, though she was entitled to it as a married woman for her separate use.

Now the question is, whether under these circumstances I am to consider this lady as having been some time in her lifetime, it does not matter how long before her death, in the position of having changed by her acts and conduct her ownership of a moiety of the proceeds of sale of the real estate into the equitable ownership of a moiety of that real estate. In the absence of any more direct act on her part, though she was not restrained from anticipation, I cannot hold that there was on her part such con-

C. A. 1879 *In re* DAVIDSON. MARTIN *v.* TRIMMER. DAVIDSON *v.* TRIMMER.

duct or such a dealing with the property upon the footing of its being at home, if that be the proper expression, or such an election on her part not to require the trust for sale to be carried into effect as would change the character of the property, and so prevent it from devolving upon her husband at her death and make it devolve upon her heir-at-law, subject to the right which the husband would have as tenant by the curtesy. I shall therefore treat Mrs. *Davidson's* interest in this property as part of the personal estate of her husband.

C. A.

The heir-at-law appealed from this decision. The appeal came on upon the 24th of January, 1879, and was ordered to stand over in order that the widow of *Hans W. Sotheby*, who was his personal representative, and entitled to both his real and personal estate, might be brought before the Court.

Mrs. *Sotheby* accordingly was served and appeared, and filed affidavits, from which the following facts appeared:—

In February and March, 1865, *Hans W. Sotheby* employed a surveyor to report upon the estate, stating that he intended laying it out for building purposes. The surveyor examined the property, and drew a plan shewing a design for laying out the land for building.

In the session of 1865 a bill was brought into Parliament for making a railway, which was intended to pass through the *Highbury* estate. A petition against the bill was presented on behalf of "the owners and trustees of the *Highbury House Park* estate," stating, among other things, that the property was well adapted for the erection of first-class residences, and that "it was the intention of your petitioners to let the said property out in plots for that purpose, but should the said bill be allowed to pass into a law the value of the said property for the erection of such residences will be entirely destroyed." There was no direct evidence as to whether Mr. and Mrs. *Davidson* knew anything about this petition, or about the survey and the preparation of the plans.

1879. March 24. *Hastings*, Q.C., and *Manby*, for Mrs. *Davidson's* heir-at-law:—

From Mrs. *Stones'* death in 1863 the parties treated the estate

as realty. Within a year the legacy was paid off, so as to get rid of the legatee, who could have insisted on a sale. The attempt to pay succession duty and not legacy duty on the death of Mrs. *Stones* shews that Mr. and Mrs. *Davidson* looked upon the property as realty. The tenancies for three years were inconsistent with an intention to sell. There was no power of leasing, and the consent of the beneficiaries to the leases must be presumed. The statements in the petition against the bill in Parliament shew an intention to keep the property in its actual condition. The Court looks to the acts of the parties, and if they are inconsistent with an intention to sell, it holds that they have elected to take the property as realty: *Harcourt* v. *Seymour* (1). The Vice-Chancellor did not attach sufficient importance to the lapse of time during which the property was kept unsold after an immediate trust for sale had arisen, and too much importance to the tenancy in common, which occurred in many of the cases in which there has been a reconversion: *Dixon* v. *Gayfere* (2); *Mutlow* v. *Bigg* (3); *Griesbach* v. *Fremantle* (4); *In re Gordon* (5).

Sturges, for Mrs. *Sotheby*:—

Mrs. *Sotheby* being absolutely entitled to a moiety *quâcunque viâ*, does not argue the point, but so far as she has any right of election, she elects to take her share as realty.

Bristowe, Q.C., and *Chapman Barber*, for the representatives of Mr. *Davidson*:—

The sale was postponed because it was very disadvantageous to sell subject to the lease.

[JAMES, L.J.:—There was no power given to the trustees to postpone the sale till the lease had run out. They were to sell "with all convenient speed," and the lease had more than twenty years to run.]

It would not be "convenient speed" to sell at a time when a sale would be very disadvantageous. The paying off the £500 is not a decisive act, and there is not a single other act in which

(1) 2 Sim. (N.S.) 12, 45.
(2) 17 Beav. 433.
(3) 1 Ch. D. 385.
(4) 17 Beav. 314.
(5) 6 Ch. D. 531.

C. A. 1879 — *In re* DAVIDSON. MARTIN *v.* TRIMMER. DAVIDSON *v.* TRIMMER.

Mrs. *Davidson* is shewn to have concurred. How can it be said that both the parties beneficially interested elected, when one of them did nothing? All persons having interests must concur to effect a reconversion: *Sisson* v. *Giles* (1). In *Crabtree* v. *Bramble* (2) the *cestui que trust* entered into possession. In *Triquet* v. *Thornton* (3) there was a deliberate expression of intention. In *Davies* v. *Ashford* (4) the *cestui que trust* took possession of the title-deeds. In *Griesbach* v. *Fremantle* (5) the *cestui que trust* had taken possession of the title-deeds and received the rents for sixteen years. In *Dixon* v. *Gayfere* (6) the *cestui que trust* expended money on the property, and dealt with it in various ways. In *In re Gordon* (7) the *cestui que trust* received the rents for nine years. The present case is similar to *Brown* v. *Brown* (8) and *Sisson* v. *Giles* (9), in which there was held to be no reconversion.

JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor cannot be sustained.

In this case it is not a question of Mrs. *Davidson* being bound by anything prejudicing her interest. She was absolute owner of the property, whether it was taken as freehold, or whether it was taken as freehold to be sold and converted into money; and the only question is, whether upon the facts and circumstances of the case it is to be assumed that she, together with the other tenant in common (of course they must be of the same mind in order to bind the trustees), was minded not to have the property sold, but to keep it as real estate until it suited her and her co-tenant in common to deal with it as they might think fit.

The trust for sale came into operation in the year 1863. That trust for sale was a trust for sale "with all convenient speed," which must mean within a reasonable time—within a year, unless there were some particular circumstances connected with the market making it advisable to postpone the sale. It was not sold for years afterwards, and no one asked the trustees to sell it.

(1) 3 D. J. & S. 614.
(2) 3 Atk. 680.
(3) 13 Ves. 345.
(4) 15 Sim. 42.
(5) 17 Beav. 314.
(6) Ibid. 433.
(7) 6 Ch. D. 531.
(8) 33 Beav. 399.
(9) 3 D. J. & S. 614.

The reason given for that on both sides is that the bulk of the estate being subject to a lease, of which there were about twenty-six years unexpired, the parties interested came to the conclusion that it would not be desirable to sell the property subject to that lease, and that it was not desirable to sell the other two small parcels of property separately, they being intimately connected with the larger. Therefore, we start with this, that in all probability all parties agreed to postpone the sale until the end of that lease, or, in fact, to put an end to the trust for sale which was to be executed by the trustees "with all convenient speed," and to hold the property for the purpose of being sold when they, the co-owners of the property, should think fit to do so.

Then, what is done afterwards? First of all the trustees enter into several three year leases or agreements for one property, and then into a three years agreement for another, which proceedings are utterly inconsistent with the execution of the trust for sale within a reasonable time, but are perfectly consistent with the notion that the parties intended to postpone the sale of the property until the lease expired. The presumption is that they came to the conclusion between them that it was not advisable to execute the trust for sale. If so, then there is an election by the persons who jointly held the whole estate in them that that trust should not be executed, and that the property should be retained in its position of real estate until all of them came to the conclusion that it was desirable to sell.

Now there happened to be one other person who had a right to have the property sold. That was a person who was entitled to have a £500 legacy paid out of it. The ordinary course would be if the property was to be sold that the £500 should be paid out of the proceeds of the sale. For no other reason, as it seems to me, than in order to prevent the property from being sold, and to enable it to be kept as real estate, the husband of the lady who was the beneficial owner of the one half found on behalf of his wife the £500, so as to get rid of the only other person who could call upon the trustees to sell. Then the two trustees, Mr. *Sotheby*, who was the beneficial owner of one half of the property, and Mr. *Davidson*, who was the husband of the lady who was the absolute owner of the other half, go on receiving the rents and profits.

C. A. 1879 *In re* DAVIDSON. MARTIN *v.* TRIMMER. DAVIDSON *v.* TRIMMER. James, L.J.

We then have this, which I cannot help thinking a very important fact, and which was not before the Vice-Chancellor, that a petition was presented to Parliament in opposition to a bill, and we have the preparation of building plans. It is true there is no direct evidence to shew that Mr. or Mrs. *Davidson* concurred in directing that petition to be prepared, but I think the presumption is that Mr. *Sotheby*, who was one of the trustees and owners, and was the principal acting trustee, did not act without their concurrence in authorizing the solicitor and parliamentary agent to present that petition. After the death of Mr. *Sotheby*, against whose character there is no imputation, we must assume that he did not act for himself only, without the concurrence of his co-tenant in common, in directing that petition to be prepared and presented, and in having the plans prepared for the purpose, no doubt, of making the strongest possible case against the railway company, and for the purpose of enhancing the value of the property. For that same purpose, with a view of shewing that the property was something for which the parties interested ought to receive more than on an ordinary sale, which would not be the case if the property was to be sold immediately afterwards, or ought to have been sold in the next year by the trustees, this statement, in which I think it must be conceived that they all joined, is inserted in the petition: "That your petitioners' property, both by its elevation, aspect, and prospect, is well adapted for the erection of first-class residences, such as now exist on the estate immediately adjoining, and it was the intention of your petitioners to let the said property out in plots for that purpose; but should the said bill be allowed to pass into law, the value of the said property for the erection of such residences will be entirely destroyed." It is to be presumed that that is in accordance with what all the parties thought at that time, that it was better not to sell the property, but to keep it for building residences; and this is quite sufficient to shew that such was their intention. All that is required here is to shew an intention on the part of all the parties beneficially interested that the property should not be converted into money, but kept as land. Looking at all the facts, they seem to me to shew that, having regard to the circumstances of the property as it stood at the time when the trust for sale came

into operation, it was the intention of the parties interested to keep it as land until the expiration of the lease. For this purpose it is quite clear that the trust for sale must have been put an end to, for an agreement between both the beneficial owners that the property should not be sold until the expiration of the lease is wholly inconsistent with the continuance of the trust for sale. There was, therefore, what is called a re-conversion of that which was directed to be converted, and was not converted by the trustees.

BAGGALLAY, L.J.:—

When Mrs. *Stones* died in August, 1863, the property which is the subject of this appeal was vested in the trustees of Mr. *Hopkinson's* will, upon trust to sell with all convenient speed, and the persons who were then entitled to the proceeds of that sale were Mrs. *Davidson*, the daughter of Mrs. *Stones*, for her separate use, and Mr. *Sotheby*. They were absolutely entitled to the fund to be produced by the sale in equal moieties, and it was quite open to them, if they thought fit, then or at any time subsequently, before any sale took place, to determine to take the property as real estate. The question is, whether that determination was arrived at.

Now, I think it is not immaterial to observe the conduct of the trustees in this matter. There were three trustees—Mr. *Hopkinson*, who lived three years after the death of Mrs. *Stones*, and died in 1866, Mr. *Davidson*, and Mr. *Sotheby*. The latter two gentlemen died in 1874 and 1876. Therefore, for a long period of time we have the trustees acting contrary to their trust. The trust being a trust for sale with all convenient speed, no sale was attempted before the time when the survivor died in 1876. When we find trustees thus acting in disregard of the trust we are put upon inquiry whether they have not done so under authority from the *cestuis que trust*, if the *cestuis que trust* are all ascertained and competent to give such authority. Is there here any evidence to shew that they were consenting parties or desiring parties that the property should not be sold? As regards one, Mr. *Sotheby*, he was himself one of the trustees who abstained from selling. He, as I have said, was absolutely entitled to one moiety of the property, and he was a party concurring in the leases which were from time to

C. A. 1879

In re DAVIDSON. MARTIN *v.* TRIMMER. DAVIDSON *v.* TRIMMER.

time made of portions of the property, and he evidently, from what has been said on both sides, was the chief acting trustee, if not almost the sole acting trustee, as regards this property. It seems to me impossible to say that, so far as Mr. *Sotheby* was concerned, there was not a determination or an election, whichever it is proper to call it, to take this property as real estate. Then as regards Mrs. *Davidson*, she lived for seven years, having the right during that period of time to have insisted upon the performance of the trust by having the property sold and taking one moiety of the proceeds. She stands by and takes no steps to secure a sale. But that is not all. She had taken this property under a deed-poll executed by her mother in her lifetime, and by that deed-poll £500 was charged upon the property appointed in her favour, which sum was to be raised and paid out of the property or out of the proceeds of the sale when the property was sold. The person entitled to that sum of £500 was also entitled to have the property sold for the purpose of having it raised, and we find Mrs. *Davidson* and her husband coming forward and paying off this £500 charge. That appears to me to be a very strong proof of the desire of Mrs. *Davidson* at this time that the property should not be sold, but should remain as real estate.

I need not add anything to what the Lord Justice has said as to the proceedings in 1865 with reference to the bill in Parliament. I do not think that the circumstances connected with the proposed payment of succession duty and the subsequent payment of legacy duty have any bearing upon the question. At the same time, there is not, in my opinion, anything in those circumstances inconsistent with the view that Mrs. *Davidson* desired to take this property as real estate.

Upon the whole, I can arrive at no other conclusion but that the beneficiaries under the will of Mr. *Hopkinson* determined to take this property as real estate, and that that determination was in force at the time of Mrs. *Davidson's* death; and that, therefore, her moiety of the property will go to her heir-at-law.

BRAMWELL, L.J.:—

I am of the same opinion.

Solicitors: *J. L. Dale; Boxall & Boxall; Young, Jones & Co.*

FISHER *v.* KEANE.

M. R.
1878
Dec. 2.

[1878 F. 138.]

Club—Power of Expulsion—Rights of Member—Misconduct—Duties of Club Committee—Injunction.

The committee of a club, being a quasi-judicial tribunal, are bound, in proceeding under their rules against a member of the club for alleged misconduct, to act according to the ordinary principles of justice, and are not to convict him of an offence warranting his expulsion from the club without giving him due notice of their intention to proceed against him, and affording him an opportunity of defending or palliating his conduct: and the Court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex parte* evidence and purporting to expel him from the club, to be null and void, and will restrain the committee by injunction from interfering, by virtue of such a resolution, with his rights of membership.

13 Ch D 349
14 Ch D 478
17 Ch D 626

THIS was an action by Major *Louis Walter Fisher*, who had for upwards of twenty years been a member of the *Army and Navy Club, Pall Mall*, claiming to have it declared that a resolution purporting to expel him from membership with the club was null and void, and that he was still a member of the club, and entitled to the privileges of such membership; that an order might be made directing that his name might be restored to the list of members; and that the Defendants—the trustees and committee of the club—and their servants, and the servants of the club, might be restrained by injunction from interfering with the enjoyment by him, as a member of the club, of the use and benefit of the club and the buildings and property thereof.

The action now came on upon a motion by the Plaintiff for the injunction claimed, but as the motion involved the whole question at issue, it was, by arrangement, treated as the trial of the action.

No statement of claim had been delivered, and the action was not yet ready to be set down for trial, but the circumstances under which the resolution in question was passed appeared from the evidence to be as follows:—

On the evening of the 14th of March, 1878, the Plaintiff dined at the club, and after dinner adjourned to the billiard-room, where

M. R. 1878 FISHER v. KEANE.

he engaged in a game at pool, one of the players being a guest of another member of the club, and also a friend of the Plaintiff. The guest, finding the game did not proceed as rapidly as he desired, said to the Plaintiff, "Get on, I want to get home: you are drunk." The Plaintiff answered, "I don't think I would say such a thing to you at your club." The guest replied, "You are drunk;" whereupon the Plaintiff retorted, "You are a d——d liar," or "It is a d——d lie."

The game was then stopped, and the conduct of the Plaintiff was reported by a member of the club to the general committee, which held its weekly meeting on the afternoon of the following day for the transaction of the ordinary business of the club.

It appeared that the general committee consisted of twenty-four members, of whom three sufficed to form a quorum. On this occasion nine members were present. At this meeting the committee, after examining two members of the club who were in the billiard-room at the time of the occurrence in question, passed a resolution purporting to suspend the Plaintiff from the use of the club from that day.

No notice of the intention of any member to propose the resolution was given to the Plaintiff, nor was he asked, nor was any opportunity offered him, to explain or palliate his conduct, although on the morning immediately after the occurrence he had written a letter of apology to the guest, couched in the fullest terms of regret, a copy of which letter was forwarded by the Plaintiff to the secretary of the club and laid before the committee at their meeting. The letter itself was not received by the guest until the following day, the 16th, but immediately on its receipt he wrote to the committee stating that he was perfectly satisfied with the Plaintiff's apology, and hoped they would not take serious notice of the matter. The Plaintiff, moreover, sent a letter of apology to the member whose guest he had insulted.

The resolution was communicated to the Plaintiff by the following letter, dated the 15th of March, and signed by the chairman of the committee:—

"Sir,—It having been brought to the notice of the committee that you last night, being in a state of intoxication, made use of insulting language to the guest of a member of the club, which

fact has been substantiated by the evidence of two gentlemen who were present, and by your own confession in a letter addressed to Captain *B*—— (the guest), they feel compelled to put in force Rule vii., and suspend you from the use of the *Army and Navy Club* from this day."

Rule vii. was as follows :—

"*Discontinuance of Members from causes affecting their personal character.*

"In case the conduct of any member, either in or out of the club-house, shall, in the opinion of the committee, or of any fifty members of the club, who shall certify the same in writing, be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign; and if the member so recommended shall not comply within a month from the date of such communication being addressed to him, the committee shall then call a general meeting, and the question shall be decided by ballot taken on the spot, according to Rule v., unless an adjournment has been agreed to by two-thirds of the meeting present, and his name shall be erased from the list, and be for ever afterwards ineligible for re-election . . . Provided that no such recommendation be sent to any member unless it shall have been agreed to by two-thirds of the committee specially summoned for that purpose. Provided also that if they unanimously are of opinion that the offence of such member is of so grave a character as in the interests of the club to warrant his immediate expulsion, they be empowered to suspend him from the use of the club, which suspension shall be final, unless twenty members of the club shall within twenty-one days demand an extraordinary general meeting, to take the conduct of the offending member into consideration, and immediately on the close of such meeting a ballot for the restoration of the suspended member shall take place, and be kept open for two hours. One black ball in ten to exclude."

In reply to the chairman's letter the Plaintiff, on the 21st of March, wrote to the committee praying to be reinstated as a member, admitting, however, that he was slightly intoxicated on the night in question, but alleging by way of excuse that he had met with a severe fall some years previously which had injured

M. R. 1878 FISHER v. KEANE.

his head and thus caused any little excess to have a serious effect upon him. He also offered to make such further apology as the committee might desire.

On the 23rd of March, the secretary of the club wrote the following letter to the Plaintiff:—

"Sir,—I am directed by the committee to acknowledge the receipt of your letter dated 21st instant, and to inform you that, under Rule vii., the matter has passed out of their hands."

Further correspondence then passed between the Plaintiff and the committee, the Plaintiff protesting that the committee had acted irregularly in suspending him; and the correspondence closed with a letter, dated the 31st of May, from the club secretary informing the Plaintiff that on the 6th of April he had ceased altogether to be a member of the club.

At the annual general meeting of the club on the 3rd of June, a resolution was moved and seconded on the Plaintiff's behalf to consider whether the action of the weekly committee on the 15th of March was in accordance with Rule vii., and to take the opinion of the meeting whether the rule had been exceeded in the present case; also to decide whether the Plaintiff was still a member of the club. This resolution was lost by a large majority, and an amendment was carried approving of the action of the committee.

The Plaintiff thereupon instituted the present action.

Chitty, Q.C., and *Hadley*, for the Plaintiff:—

We submit that the proceedings of the committee have been altogether irregular. According to the fair and literal construction of Rule vii. the committee must be "specially summoned" before they can pass any resolution calling upon a member to resign or expelling him from the club. But, moreover, according to the ordinary principles of justice, notice should be given to the member of the intention of the committee to inquire into his conduct, in order that he may have an opportunity of meeting the charges brought against him. The committee should have before them the means of exercising a sound and honest discretion, otherwise, as Lord Chancellor *Hatherley* held in *Dean* v. *Bennett* (1).

(1) Law Rep. 6 Ch. 489.

a resolution of expulsion is invalid. We admit that when the decision of a domestic tribunal of this nature has been arrived at *bonâ fide*, the Court has no jurisdiction to interfere: *Hopkinson* v. *Marquis of Exeter* (1); *Reg.* v. *Governors of Darlington School* (2); but how can it he said that the decision of the committee in the present case has been arrived at *bonâ fide* or in the exercise of a sound discretion? On the contrary, the whole of the circumstances shew that the committee have exercised their powers most oppressively, on wholly insufficient evidence, and in contravention both of the letter and the spirit of their rules.

Davey, Q.C., and *Horne Payne*, for the Defendants:—

All that is required on the part of the committee is that they should exercise their power in a *bonâ fide* manner: provided they do not act with bias the exercise of their authority cannot be interfered with, and the question whether their decision is just or unjust is immaterial: *Gardner* v. *Fremantle* (3).

[JESSEL, M.R.:—I am not aware of any authority that a committee or any other body of persons can, without giving him notice of the charge, convict a man of gross misconduct.]

Rule 7 gives the committee the widest powers and discretion as to suspension or expulsion of members. There is no suggestion that the decision of the committee was actuated by malice or caprice; and we submit that when once they have arrived at a decision *bonâ fide*, without any caprice, or arbitrary conduct, their judgment is final.

JESSEL, M.R.:—

I must say that I think the applicant is right in law on both grounds.

In the first place I have to consider what the true construction of the rule in question is; and in the second place I have to consider whether the method adopted by the committee of putting that rule in force was such as, according to the rules of conducting judicial or quasi-judicial proceedings, ought to have been adopted.

(1) Law Rep. 5 Eq. 63. (2) 14 L. J. (Q.B.) 67.
(3) 19 W. R. 256.

M. R. 1878 FISHER v. KEANE.

Now first of all, as to the meaning of the rule, I myself entertain no doubt whatever. The rule says that "In case the conduct of any member, either in or out of the club-house, shall, in the opinion of the committee, or of any fifty members of the club . . . be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign;" and if he does not do so within a month the committee is to call a general meeting, and the general meeting is to decide whether he shall remain a member or not; "Provided that no such recommendation be sent to any member unless it shall have been agreed to by two-thirds of the committee specially summoned for that purpose. Provided also"—this is an additional proviso—"that if they unanimously are of opinion that the offence of such member is of so grave a character as in the interests of the club to warrant his immediate expulsion, they be empowered to suspend him from the use of the club, which suspension shall be final unless twenty members of the club shall, within twenty-one days, demand an extraordinary general meeting, to take the conduct of the offending member into consideration;" and then at the close of the meeting a ballot is to take place, and one black ball in ten is to exclude the offending member.

The frame of the rule appears to me to be clear. There are two provisoes. First, a member shall not be recommended to resign unless the recommendation is agreed to by two-thirds of the committee specially summoned for the purpose: and secondly, "if they are unanimously of opinion, &c., they shall have power to suspend him." Who are "they"? Why, the committee specially summoned for that purpose. As to the grammatical meaning I think there can be no question. Is there a context to overrule the grammatical meaning? So far from finding such a context, I find the strongest reason for coming to the conclusion that the grammatical reading is the true reading, for the second section, if I may so call it, is a very much more serious matter than the first. The committee may recommend the member to resign if they think his "conduct" shall be merely injurious to the character and interests of the club, but they are not to exercise the second power unless the "offence" is of so grave a character—it is not merely "conduct" now, but "offence," which is a much stronger word—

as in the interests of the club to warrant his immediate expulsion. It would be strange indeed if to decide upon the minor offence you require a committee specially summoned, while to decide upon the major offence a casual daily or weekly committee for auditing the cook's accounts, and so on, is to be considered the proper body.

That becomes all the more clear to my mind when you find this is a committee of twenty-four members, and that the ordinary quorum is three: so that the character and prospects in life of any member of this club may be irremediably blasted—for that is the result—by the decision of any three casual members of the committee who happen to walk in on a week-day, having no notice of what is about to be brought before them, but merely with the intention probably of auditing the cook's accounts, or attending to some equally trivial matter. I do not think, when you consider the substance of this rule, that there can be any question but that the grammatical reading of this section ought to be, and is, the true reading of it.

That being so, it appears to me that the meeting of the committee on the 15th of March was not properly constituted to consider the question, and therefore that their decision is altogether invalid. But I ought not to part with the case without also giving my opinion as to the second ground of complaint.

The second ground of complaint is this: that a committee of English officers and gentlemen—I say officers, because, having been officers in the army, they have no doubt been accustomed to sit on courts martial, and must be more familiar than ordinary English gentlemen with the proper mode of administering justice—that a committee, I say, of English gentlemen and officers in the army take upon themselves to decide *ex parte*, without notice to the member accused, and without hearing all the circumstances of the case, that his offence is, in the words of the rule, "of so grave a character as in the interests of the club to warrant his immediate expulsion."

More than that,—the expulsion is to take effect "unless twenty members of the club shall within twenty-one days demand an extraordinary general meeting, to take the conduct of the offending member into consideration." It is said that under that part of the

M. R. 1878 FISHER v. KEANE.

rule there is an appeal to a general meeting. But what appeal? The committee may have given their decision in a period of vacation, when all the members, or the great majority of them, who are friends or acquaintances of the member inculpated, may be absent abroad, or at a distance, in *Ireland* or *Scotland*, and he is unable to get twenty members together. It by no means follows that a man can get twenty members as a matter of course within any twenty-one days; and if he does, he does not appeal to an ordinary tribunal. One black ball in ten is to exclude, so that if nine-tenths of the members of that meeting shall be of opinion that the man has been unjustly expelled, the voting being by ballot, his character will still be blasted before the world at large; he will be pointed at with the finger of scorn as the officer expelled from the *Army and Navy Club* for a grave offence, which was such as—using the very words of the rule—"to warrant his immediate expulsion," and with no remedy in the world that I can see beyond that futile remedy which is offered by this rule.

It does appear to me that, with such a case as this before them, English gentlemen should at once have said, "We must hear the whole case before we decide; we must know what this officer has to say for himself, what excuse he can give in palliation of his conduct; and after having heard him, and after having taken time to consider the whole matter, we shall then decide whether we will place him in this unfortunate position."

One must recollect, too, that the meetings of clubs are not always fair for another reason, quite independently of any personal impropriety of conduct on the part of its members. Many members of clubs are unpopular in the clubs; they make enemies. The meeting may be composed of members some of whom may say, "Well, Major so-and-so is a man we ought to get rid of, and I shall put in a black ball." Another may say, "Oh, we must support the committee; they have acted to the best of their judgment. They are all honourable men—men in whom we have the greatest confidence; if we do not support them they will resign, and it will break up the club; I shall put in a black ball." It is not like an appeal to a judicial tribunal, or even to a quasi-judicial tribunal. As I said before, it does behove the committee, who are a judicial, or quasi-judicial tribunal, to be very careful

before they expose one of their fellow-members to such an ordeal. They ought to gravely consider, when proceeding to enforce such a rule as this, whether he has committed any offence at all, and especially whether he has committed such an offence as will warrant their branding him with the name of an expelled member of their club.

In the present instance they did nothing of the kind. At a meeting, without notice, a few members only being present, they allowed two other gentlemen, behind the back of the Plaintiff, to make a statement as to what he said and did in the billiard-room on the night in question. They had nothing before them on his part except the copy of a letter of apology, which he had sent to the gentleman whom he had insulted, which did not state the facts, but merely stated that he had used a foolish and insulting expression, which he desired to withdraw at the earliest possible opportunity.

The very able counsel for the Defendants has said, "Oh, but it was immaterial; they had everything before them that it was necessary for them to form a decision upon." Now, it is not absolutely necessary that I should give any opinion upon this part of the case, but I feel bound to say that, as far as I am concerned, I think they had not.

In the first place, the Major states circumstances which, whether they are of more or less weight, are circumstances which ought to be considered, and I have no doubt will be considered, when the proper time arrives, by the committee. He states that, although he was slightly intoxicated on the night in question, he has suffered from a fall, which has injured his head, and that thus a very small quantity of wine produces slight intoxication. Whether that is a palliation or not it is for the committee to decide; but the fact they did not know at this time.

Again, he states also, and that appears to be confirmed, that the next morning, feeling conscious of having done wrong, he sent a letter of apology to the gentleman whom he had offended, who happened to be a private friend of his own. A copy only of that letter was before the meeting, but he states further that that gentleman—the person principally offended—was quite satisfied with the apology, accepted it, and hoped the matter might go no

M. R. 1879 FISHER v. KEANE.

further. That is a circumstance that was not before the committee.

Again, it appears that he found out afterwards that the gentleman insulted had been a guest of another member of the club. He then did this: He sent a letter of apology to that member also, apologising for having insulted his guest.

After all, the question whether or not this is an offence of so grave a character as, in the interests of the club, to warrant his immediate expulsion, should be decided by the club, or the committee of the club, having regard to everything that occurred. But, as I have already stated, things have occurred additional to the matters which were really before them, and though I for one am by no means in the habit of going beyond my province and have no right to give an opinion as a Court of Appeal from the committee —it is for them absolutely to decide upon all these questions which may come before them—still, if they did not know all these circumstances, if they did not know, which it does not appear they did, that the occasion of the insulting expression, which I am not afraid to repeat, was in answer to an accusation of drunkenness by the other gentleman who was present, an accusation to some extent well-founded, and that in answer to this the Plaintiff, somewhat intoxicated, simply said, "It is a d——d lie," I think they will consider, and I hope they will carefully consider, whether such an offence as that is of so grave a character as, in the interests of the club, to warrant the immediate expulsion of an old and gallant officer, who has been for many years a member of the club.

It is not for me to express any opinion upon this part of this case, but I hope when the committee come to reconsider it, as they will undoubtedly, that they will consider it with an impartial mind, and without any reference to the circumstances that have since occurred. Be that as it may, in my opinion a committee, acting under such a rule as this, are bound to act, as Lord *Hatherley* said, according to the ordinary principles of justice, and are not to convict a man of a grave offence which shall warrant his expulsion from the club, without fair, adequate, and sufficient notice, and an opportunity of meeting the accusations brought against him.

They ought not, as I understand it, according to the ordinary

M. R.
1879
FISHER v. KEANE.

rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation for ever—perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.

In my opinion, upon this ground also the committee have not acted properly or fairly. I have no doubt they acted according to the best of their judgment, and with the utmost desire to do what was right; but I think they have made a mistake, and that the right course is to grant an injunction, so that they may have an opportunity of reconsidering the matter, as I trust they will do, in a fair and impartial spirit.

As it has been arranged to treat this motion as the trial of the action, the Plaintiff will set down the action, and there will be final judgment for the Plaintiff in the terms of the writ, with costs.

Solicitors: *Lewis & Whitsed; W. T. Manning.*

LONDON ASSURANCE *v.* MANSEL.

M. R.
1879
March 1.

[1878 L. 273.]

Assurance—Proposal for Policy on Life—Concealment.

In a proposal by *M.* to an assurance office for an assurance on his life, in answer to the question, "Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" his answer was, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." The proposal was accepted, but the office having subsequently ascertained that the life of *M.* had been declined by several offices:—

Held, that there had been a material concealment, and that the office was entitled to have the contract set aside.

THIS was an action by the Plaintiffs, who were duly incorporated by the name of "*The London Assurance*," and were empowered to grant assurances on lives, to set aside an agreement to grant a policy of life assurance to the Defendant.

On the 16th of August, 1878, the Plaintiffs, on the application

M. R.
1879
LONDON ASSURANCE v. MANSEL.

of the Defendant's solicitor, sent him forms of proposal for life assurance, and on the 20th of August, 1878, the Defendant left with the Plaintiffs at their office a proposal for assurance on his life for £10,000 filled up on one of the Plaintiffs' forms of proposal, and signed by the Defendant. The questions and answers contained in this proposal, so far as material, were as follows:—

Questions.	Answers.
"Are you now and have you always been of temperate habits?" . .	"Yes."
"State if there be any other material circumstance affecting your past or present state of health or habits of life to which the foregoing questions do not extend?"	"Not to my knowledge."
"Has a proposal ever been made on your life at any other office or offices? If so, where?	"Insured now in two offices for £16,000 at ordinary rates. Policies effected last year?"
"Was it accepted at the ordinary premium, or at an increased premium, or declined?"	

At the foot of the proposal the Defendant signed the following declaration: "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the *London Assurance*."

On the same day the Defendant had an interview with the medical officer of the Plaintiffs, and in reply to his inquiries gave substantially the same answers as those in the proposal before stated.

The Plaintiffs being, as they alleged, satisfied with and relying upon the said proposal, and with the report of their medical officer, and with the answers they had received from two friends of the Defendant to whom he had referred them, sent to the Defendant's solicitor a written acceptance of the proposal for an assurance of £10,000 on the Defendant's life, and, on the 23rd of August, 1878, received from him a cheque for the first year's premium, and on the 24th of August, 1878, the Plaintiffs sent him the usual certificate as to the assurance being effected.

The Plaintiffs alleged that, shortly after the last-mentioned date, they discovered that, though the Defendant's life had been assured for £10,000 in the *Rock Life Assurance Company*, and also for £6000 in the *Equity and Law Life Assurance Society*, the last-named assurance society had in November, 1877, when the Defendant applied for a further assurance of £3000, decided not to increase the amount at risk on his life; also that the Defendant had shortly afterwards made proposals to the *Scottish Equitable Society* and to the *Crown Insurance Society*, who had respectively declined his proposals, to the *North British and Mercantile Insurance Society*, which proposal was withdrawn, and to the *Liverpool, London, and Globe Company*, by whom the proposal was not accepted; that in June, 1878, the *English and Scottish Law Life Assurance Association*, after accepting a proposal for an assurance of £5000 on the life of the Defendant, had refused to proceed with it on learning that the *Equity and Law Life Society* had declined the further assurance of the Defendant's life; also, that in August, 1878, the Defendant had applied for assurances on his life to the *Clerical Medical and General Life Assurance Society*, to the *Scottish Amicable Assurance Society*, and the *Law Life Assurance Society*, but that each of the said offices had declined his proposals.

The Plaintiffs alleged that they thereupon determined not to proceed with the assurance, and that their solicitors wrote to the Defendant's solicitor to that effect, and sent a cheque for the amount of the premium, which was returned by the Defendant.

The Plaintiffs then brought their action, setting out in their statement of claim the facts before stated, and alleging that it was the duty of the Defendant to have informed them that his life had been refused by the said several offices, that such fact was a very material fact in a contract of life assurance, and that the Plaintiffs would not have entertained the Defendant's proposal for assurance had he informed them that his life had been refused by other offices, which the Defendant had concealed.

The Plaintiffs claimed a declaration that the acceptance by the Plaintiffs of the Defendant's proposal for assurance on his life for £10,000, and the contract by the Plaintiffs for the assurance on the life of the Defendant, were void.

The Defendant, by his statement of defence, admitted the

M. R. 1879 LONDON ASSURANCE v. MANSEL.

Plaintiffs' allegations as to the proposal and as to the two policies that had been effected, also that the *Equity and Law Life Society* had decided not to increase their risk, the reason being that they considered their risk sufficiently large. With regard to the other proposals, the Defendant stated as follows:—

"The Defendant admits that proposals were made to the *Clerical, Medical, and General Life Assurance Society*, the *Scottish Amicable Life Assurance Society*, and the *Law Life Assurance Society*, for an assurance on his life, and such proposals were declined, without any medical examination."

In paragraph 15 he stated as follows:—"The Defendant is not and never has been of intemperate habits of life, and although proposals for assurances on the Defendant's life had been made to and declined by the several offices in the statement of claim mentioned, the Defendant's life was never rejected by an office, but was passed as a first-class life by every medical officer who examined him." The Defendant also stated that the *English and Scottish Law Life Assurance Society* passed his life as a first-class life, but they reserved the right of declining to complete the transaction at any time before the receipt of the premium; but that, having learned that the *Equity and Law Life Assurance Society* had decided not to increase their risk on the Defendant's life, and would not take any part of the new risk, exercised their right of declining to complete the transaction."

The Defendant submitted that there had been no concealment such as to vitiate the contract.

The case was heard on motion for judgment on admissions in the pleading.

Benjamin, Q.C., *Davey*, Q.C., and *Nalder*, for the Plaintiffs:—

The Plaintiffs in this case are entitled to set aside the contract on the ground that the Defendant, in his answers to the questions in the proposal, which by his admission form the basis of the contract, concealed the fact that his life had been declined by several other offices. When the statements in a proposal for life assurance are untrue in fact, that is sufficient to avoid the contract: *Macdonald* v. *Law Union Fire and Life Insurance Company* (1).

(1) Law Rep. 9 Q. B. 328.

Chitty, Q.C., and *Levett*, for the Defendant:—

The Plaintiffs in this case have entered into a contract on the basis of negotiations which they admit are true but which they allege are not sufficient, because they have since ascertained some other facts which they say are material. But this is not sufficient to invalidate a contract for life assurance. In *Lindenau* v. *Desborough* (1), though it was held that it was the duty of a party effecting an assurance on life or property to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance, yet it was laid down that it was a question for the jury whether any particular fact was or was not material. The same principle was recognised in *Morrison* v. *Muspratt* (2). Here we submit that everything that was material was disclosed, and though the question might have been more fully answered by the Defendant, still the Plaintiffs were satisfied with the answer without inquiring further whether the Defendant's life had been declined by any other office. They cannot now raise the question and come to the Court to set aside the contract.

JESSEL, M.R.:—

The action in this case is to set aside an agreement for assurance for life on the ground of concealment of a material fact in effecting the assurance.

The first question to be decided is, what is the principle on which the Court acts in setting aside contracts of assurance? As regards the general principle I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and, though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.

But I think the law has been laid down very often, and I am going to refer to two or three statements of it, which at all events are binding on me.

(1) 8 B. & C. 586. (2) 4 Bing. 60.

M. R.
1879
LONDON ASSURANCE v. MANSEL.

In the case of *Dalglish* v. *Jarvie* (1), a case which had nothing to do with insurance, but which referred to the principles on which a special injunction ought to be granted *ex parte*, Lord *Cranworth*, then the Lord Commissioner *Rolfe*, says this: "Upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, '*uberrima fides*.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud: but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy."

Here it is to be observed that he says, "In cases of insurance;" he does not say one kind of insurance or another kind of insurance, but it is the more valuable because he is stating the law as settled as a mere illustration of the similar law which he considers to apply to applications for special injunctions when a man comes for one *ex parte*. If he conceals anything he knows to be material, it is fraud, and if he conceals anything that may influence the rate of premium, although he does not know it, it still vitiates the policy.

In another case, which again is not directly in point, turning on a contract, the case of *Moens* v. *Heyworth* (2), we have a *dictum* of Baron *Parke*. It was a case of ordinary mercantile contract, not of an insurance contract. Baron *Parke* says: "The case of a policy of insurance does not appear to me to be analogous to the present; those instruments are made upon an implied contract between the parties that everything material known to the assured should be disclosed by them. That is the basis on which the contract proceeds, and it is material to see that it is not obtained by means of untrue representation or concealment in any respect;" that means, of course, concealment in any material respect.

Then in the case, which was an action on a policy of insurance,

(1) 2 Mac. & G. 231, 243. (2) 10 M. & W. 147, 157.

of *Lindenau* v. *Desborough* (1), Lord *Tenterden* says: "Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any reasonable man would think material." That passage shews that the non-answering of a specific question in Lord *Tenterden's* opinion would amount to concealment if the man knew the fact and was able to answer it.

Mr. Justice *Bayley* says (2): "I think that in all cases of insurance"—then he goes on to add what Lord *Cranworth* did not add, but which he meant—"whether on ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach." Then Mr. Justice *Littledale* says: "I am of the same opinion. It is the duty of the assured in all cases to disclose all material facts within their knowledge. In cases of life insurance certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which, had they been known, would no doubt have been made the subject of specific enquiries." He puts it more strongly, therefore, when it is a specific inquiry.

Now I come to the facts of the case, which certainly appear to me to be very plain and clear indeed. The office of the *London Assurance* asks these questions: "Has a proposal ever been made on your life at any other office or offices; if so, where? Was it accepted at the ordinary premium, or declined?" and there is an agreement at the end, "That this proposal and declaration shall

(1) 8 B. & C. 591. (2) 8 B. & C. 592.

M. R. 1879 LONDON ASSURANCE v. MANSEL.

be the basis of the contract between the assured and the company." Here is the answer: "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." It is to be observed that the man proposing the assurance, who knows the facts, does not answer the question. The question was, "Has a proposal been made at any office or offices; if so, where?" He does not state, "I proposed to half a dozen offices," which was the truth, but simply says, "Insured now in two offices," which of course must have been intended to represent an answer, and therefore would mislead the persons receiving it, who did not look at it with the greatest attention, into the belief that he was insured in two offices, and that they were the only proposals that he had made. "Was it accepted at the ordinary premiums or an increased premium?" His answer is, "At ordinary rates." That is the answer to the second branch of the inquiry, but he has not answered the question, "or declined?" The inference, therefore, which must have been intended to be produced on the mind of the person reading the answer was that it had not been declined. And in my opinion that is the fair meaning of the answer, and the assured is not to be allowed to say, "I did not answer the question." But if it were so it would make no difference, because if a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact.

The question is whether this is a material fact? I should say, no human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a moment that it is a fact of great materiality, a fact upon which the offices place great reliance. They always want to know what other offices have done with respect to the lives. But in this case there could be no question as to its materiality. In the first place we have this in the answer: "The Defendant admits that proposals were made to the *Clerical, Medical, and General Life Assurance Society*, the *Scottish Amicable Life Assurance Society*, and the *Law Life Assurance Society* for an assurance on his life, and such proposals were declined." There are three proposals as admitted by the

answer declined in the very words of the question; and then he goes on:—[His Lordship then stated paragraph 15 of the answer, and added:—] We have an admission by the Defendant that no less than five insurance offices had declined to accept his life.

Now, to suppose that any one who knows anything about life insurance, that any decent special juryman could for a moment hesitate as to the proper answer to be given to the inquiry, when you go to the insurance office and ask for an insurance on your life, ought you to tell them that your proposals had been declined by five other assurance offices? is, I say, quite out of the question. There can be but one answer—that a man is bound to say, "My proposals have been declined by five other offices. I will give you the reasons, and shew you that it does not affect my life," as he admits it to be by this answer; but of that the office could judge. There can be no doubt, as a proposition to be decided by a jury, that such a circumstance is material. But in fact I have elements here admitted on the pleadings for deciding that question quite irrespective of the ordinary knowledge of the practice of mankind in respect of these matters which is to be imputed to a good special juryman, because I have here two things admitted, first of all that the proposal which forms the basis of the contract asks a question—Has a proposal been declined?

Now where it is to form the basis of the contract it is material, because, as was held in a case in the House of Lords of *Henderson* v. *Fitzgerald* (1), where it is part of the contract, the other side cannot say it is not material. So here we have the proposal as the basis of the contract. It is impossible for the assured to say that the question asked is not a material question to be answered, and that the fact which the answer would bring out is not a material fact.

Further, we have this, that within the Defendant's own knowledge the *English and Scottish Law Life Assurance Society* having accepted his life, which had been duly passed by their medical officer as a first-class life after examination, and merely reserving a right to decline, when they found that one other office, not five, but one, had declined the life, or rather the proposal, at once

(1) 4 H. L. C. 484.

M. R. 1879 LONDON ASSURANCE v. MANSEL.

withdrew from their acceptance and declined his proposal. So that the Defendant had the strongest reasons for believing from actual knowledge that the fact of a proposal having been declined was a most material circumstance, and would have the greatest effect on the mind of the proposed assurers.

It seems to me a very plain and clear case, and that the Plaintiffs are consequently entitled to judgment.

The order will be—The Plaintiffs being willing and hereby offering to return the premium, declare that the acceptance by the Plaintiffs of the Defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled.

Solicitors for Plaintiffs: *Collyer-Bristow, Withers, & Russell.*

Solicitors for Defendant: *Hacon & Turner*, agents for *C. Norton, Swansea.*

M. R. 1879 *March* 22.

In re URUGUAY CENTRAL AND HYGUERITAS RAILWAY COMPANY OF MONTE VIDEO.

Limited Company — Mortgage Bond — Principal and Interest payable to "Bearer"—Bond Trust Deed—Covenant by Company to pay Trustees—Unpaid Interest—Winding-up Petition by Bondholder—Creditor—Right to Winding-up Order—Regarding wishes of Creditors—Companies Act, 1862, *s.* 91.

21 Ch D 772
24 Ch D 259
263-4

A limited railway company issued, under the provisions of a trust deed, £100 "mortgage bonds," in order to raise money for the construction of their railway. By the deed the company covenanted with the trustees that all the bonds should rank *pari passu*, and that every bond should entitle the holder to a fully paid-up ordinary share in the company as a "bonus share;" that the company would pay to the trustees the interest on the bonds, and also an annual sum by way of sinking fund for the discharge of the bonds; and that the bond debt, interest, and sinking fund should be a charge on the railway. Each bond contained a covenant by the company with the trustees for payment of £100 to the "bearer thereof," and of interest to the "bearer" of the coupons annexed thereto.

The interest on the bond debt having fallen into arrear, a winding-up petition was presented by a holder of six bonds, but was dismissed with costs, on the ground, 1, that neither the bearer of the bond, as to principal, nor the bearer of the coupons, as to interest, was a creditor of the company either at law or in equity within the meaning of the Companies Acts, his

right of action being through the trustees only; and, 2, that assuming a bondholder to be a creditor, then, under sect. 91 of the *Companies Act*, 1862, regard must be had to the wishes of the bondholders other than the petitioner, all of whom opposed the petition.

As a general rule, an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ;* but that rule is subject to exceptions: *e.g.*, where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order.

PETITION.

The *Uruguay Central and Hygueritas Railway Company of Monte Video, Limited,* was incorporated in the year 1873 by the registration of a memorandum and articles of association under the Companies Acts, 1862 and 1867. Its nominal capital was £600,000, in 30,000 shares of £20 each; and its objects were, amongst other things, 1, to acquire the benefits of certain concessions whereby the Government of the Republic of *Uruguay* authorized the construction and working of a railway in *Uruguay*, and guaranteed the net earnings to the amount of 7 per cent. on £10,000 per mile for forty years; 2, to enter into and carry into effect with or without variations the provisions of a certain trust deed; and, 3, to undertake the construction and working of the railway.

The trust deed referred to was an indenture made the 9th of January, 1873, between *Waring Brothers*, contractors for public works, of the first part, the company of the second part, and *George Wilkinson Drabble*, Lord *Henry Gordon Lennox*, and *Loftus Fitzwygram*, of the third part, whereby, after reciting that the concessions were then vested in *Waring Brothers*, and that the company had agreed to employ *Waring Brothers* as their contractors, and for the purpose of payment to them of the consideration agreed on, as thereinafter expressed, for the transfer in manner thereinafter mentioned of the said concessions, and for the construction of the railway, it had been agreed that there should be issued such fully paid-up shares in the company as thereinafter mentioned, and also bonds of the company transferable to bearer of the nominal value in the whole of £1,200,000, and that the moneys thereby raised should be held upon the trusts thereinafter declared; and that it had been also agreed that such bonds should be issued at such price, and should be entitled to such privileges and

M. R.
1879
In re URUGUAY CENTRAL AND HYGUERITAS RAILWAY COMPANY OF MONTE VIDEO.

such fully paid-up shares by way of bonus, and such rate of interest and redeemable at cash price, and on such terms, and be subject to such conditions as were respectively prescribed by the present indenture; it was witnessed that for the consideration therein mentioned, *Waring Brothers*, by the direction of the company, assigned the concessions, and the rights and powers thereby conferred, to the parties of the third part upon the trusts thereinafter declared. And *Waring Brothers* covenanted with the trustees and with the company, and the company covenanted with the trustees and *Waring Brothers* in manner thereinafter mentioned. The deed then, after providing for the construction of the railway by *Waring Brothers* in accordance with the terms of the concessions, contained the following clauses:—

"5. *Waring Brothers* may at any time hereafter, without incurring any liability, except under this present deed, invite or employ brokers to invite, at the expense of *Waring Brothers*, as between them and the company, subscriptions for the said capital of £1,200,000, to be represented by bonds of the company, and either altogether or in parts, and at one or more time or times, may fix the time and amounts of the payments, or the same may issue provisional or scrip certificates in exchange for bankers' receipts for such payments, and make provisions for the forfeiture of any payments made upon default in any future payments (subject to the provisions hereinafter contained), and may direct the said trustees or trustee to issue, and the said trustees or trustee may accordingly issue, definitive bonds of the company in such form as the said trustees or trustee shall approve, subject to the conditions following; namely, such bonds shall be sealed with the company's seal and countersigned by two or more of the trustees of these presents for the time being. Each such bond shall be for the nominal value, to be specified thereon, of £100 sterling money of *Great Britain*, and shall carry interest on its nominal amount at the rate of £7 per cent. per annum, payable half-yearly to the bearer of the coupon or interest warrant annexed thereto, at the time and place specified therein, and be redeemable by the operation of a cumulative sinking fund of one-half per cent. as hereinafter mentioned: and with each such bond there shall be issued in the first place to the person entitled to such bond one fully

paid-up ordinary share in the company as a bonus share to come out of the 12,000 bonus shares hereinafter mentioned."

Clause 6 provided that "the total nominal value of all the bonds to be issued shall not exceed the sum of £1,200,000. All the said bonds shall in all respects rank *pari passu*, notwithstanding any priority of number, date of issue, or registration."

Clause 8 provided that the consideration payable to *Waring Brothers* should be the sums raised by the bonds and a certain number of preference and ordinary fully paid-up shares.

"15. The company shall and will from time to time issue, as fully paid-up, 15,000 preference and 15,000 ordinary shares in the company, and will deliver them to the said trustees or trustee for the purposes hereinafter expressed; that is to say, such 15,000 preference and 3000 of such 15,000 ordinary shares shall be set aside and applied as part of the consideration payable to *Waring Brothers*, as hereinbefore provided; and the 12,000 shares forming the residue of the said 15,000 ordinary shares shall be retained by the said trustees or trustee as bonus shares, and shall be applied as bonus shares in connection with the issue of the said bonds as herein provided."

By clause 19 *Waring Brothers* were until the 1st of January, 1875, the time fixed for the completion of the railway, to pay to the trustees the interest on all bonds issued up to that date, so as to enable the trustees to pay the interest to the holders of the bonds on the appointed days; or if any section of the railway was, through the default of *Waring Brothers*, not completed at that date, then *Waring Brothers* were to pay to the trustees the interest on a proportionate part of the bond capital.

Clause 22 provided that the capital amount represented by the said bonds, and the interest and the sinking fund thereon, should be a first charge on the assigned premises, and on the railway and other property of the company.

"23. The company shall and will at all times hereafter pay to the said trustees or trustee . . . the amount of interest for the time being payable . . . in respect of so many of the said bonds as shall for the time being have been issued and be undischarged, and such sums in respect of interest shall be paid, at such times

M. R. 1879 — *In re* URUGUAY CENTRAL AND HYGUERITAS RAILWAY COMPANY OF MONTE VIEDO.

as shall be necessary to enable the said trustees or trustee to pay the said interest on the days appointed for payment thereof, and the said trustees or trustee shall apply the same accordingly."

By clause 24 the company were to pay to the trustees one-half per cent. per annum on the nominal value of the bonds issued by way of a cumulative sinking fund to be applied by the trustees in the gradual discharge of the bonds.

By a subsequent deed of the 1st of December, 1873, the provisions of the trust deed were varied in certain respects not material to be stated.

£100 bonds to the aggregate amount of £143,300 were issued in accordance with the provisions of the trust deed, the Petitioner being the holder of six of such bonds.

The form of bond was as follows:—

"No. 2000. £100.

The Uruguay Central
and
Hygueritas Railway Company
of
Monte Video, Limited.
First Mortgage Bond.

"Part of a sum of £1,200,000 represented by bonds similar to this present bond, issued under and subject to the provisions of and secured by an indenture or deed of trust, dated the 9th day of January, 1873, as varied by another indenture dated the 1st day of December, 1873, both such indentures being made between," &c., "(a short epitome of certain of which provisions is appended hereto), whereby the capital amount represented by the said bonds, and the interest and sinking fund thereon are declared a first charge on the railway and other property of the company therein mentioned, such bonds in respect of such charge ranking *pari passu* among themselves notwithstanding any priority of issue, date, or registration.

"The *Uruguay Central and Hygueritas Railway Company of Monte Video, Limited* (hereinafter called 'the company'), in consideration of the sum of £100 owing by them on the security of this bond, hereby covenant with the said *George Wilkinson Drabble*,

Lord *Henry Gordon Lennox*, and *Loftus Fitzwygram*, their executors and administrators, that the company will, by the operation of such cumulative sinking fund as mentioned below, pay to the bearer hereof the sum of £100 on the 31st day of December, 1915, or on such previous 31st day of December on which this debenture, having been drawn, shall become payable in accordance with the above-mentioned provisions, and also will pay interest on the said sum of £100, so owing as aforesaid, at the rate of £7 per cent. per annum from the 30th day of June, 1874, until payment of the said principal sum, or such earlier day when interest shall cease to run on this bond, in accordance with the said provisions, by half-yearly payments on the 30th day of June and the 31st day of December in every year, to the bearer of the respective coupons or interest warrants annexed hereto, at the times and place respectively specified therein, and also will every year, commencing in the year 1876, until all the bonds representing the above-mentioned capital sum which shall be issued shall have been redeemed and discharged, pay to the trustees or trustee for the time being of the above-mentioned indentures, by way of cumulative sinking fund to be applied in the discharge of the said bonds, as prescribed in the said provisions, the amount of one-half per cent. per annum on the nominal value of the said bonds which shall have been issued, whether discharged or not, to be increased from year to year by the amount of a year's interest, at the rate of £7 per cent. per annum on the nominal value of so many of the said bonds as shall in previous years have been appointed to be discharged as aforesaid: and also will give due effect to the charge created as above mentioned for the security of such payments and the provision of the said sinking fund, and to all the rights and remedies by the said indentures granted and conferred upon the trustees thereof and the holders of the said bonds for securing the repayment of the said principal sum and interest. Given under the common seal of the above-named company this day of 18 ."

Then followed an "Epitome of certain of the provisions of the above-mentioned indentures subject to which and to all other the provisions of such indentures this bond is issued and held."

M. R.

1879

In re URUGUAY CENTRAL AND HYGUERITAS RAILWAY COMPANY OF MONTE VIDEO.

The following was the form of coupon:—

"*Uruguay Central and Hygueritas Railway Company of Monte Video, Limited.* No. —— Due 31st Dec. 1884.

Interest warrant for £3 10 0

a half-year's interest on £100 bond hereto annexed

Payable in *London* at the

London and River Plate Bank, Limited."

Each bond bore the company's seal, was signed by a director, and countersigned by the secretary and trustees.

The railway, or part of it, had been completed and opened for traffic, but the earnings were not sufficient for payment of the interest on the bond debt. Through the failure of the Government of *Uruguay* to perform its guarantee, the company made default in payment of the interest on their bond debt; and a sum of £93 being due to the Petitioner for arrears of interest upon his six bonds, he, after having served the usual statutory demand, presented this petition to wind up the company, alleging that it was insolvent.

It was said that the suspension of payment of the interest was merely temporary, and that the Republic would shortly provide funds for its payment.

All the bondholders, except the Petitioner, to the amount of £142,700, had signified their opposition to a winding-up.

Burton Buckley, for the Petitioner:—

I submit that as an unpaid creditor of the company the Petitioner is entitled, as between himself and the company, under sects. 79 and 80 of the *Companies Act*, 1862, to a winding-up order *ex debito justitiæ*: *In re Western of Canada Oil, Lands, and Works Company* (1); *In re London Suburban Bank* (2). The fact that the other creditors oppose the petition is no bar to the Petitioner's clear right as against the company; the only question in which the other creditors can have a voice is whether the winding-up shall be compulsory or under supervision: *In re West Hartlepool Ironworks Company* (3). It is true that in *In re St. Thomas' Dock Company* (4) the creditor's petition was ordered to stand over in order

(1) Law Rep. 17 Eq. 1.
(2) Ibid. 6 Ch. 641, 643.
(3) Law Rep. 10 Ch. 618
(4) 2 Ch. D. 116.

to give the company an opportunity of paying his debt, but that was because there were no assets to be gained by an immediate winding-up order, whereas in the present case something would be gained by such an order, for the company's property might be sold and the Petitioner's debt paid, since no one has any priority over him. At any rate, all that can be asked for in opposition to the Petitioner's claim is that time may be given to see whether his debt can be paid; if not, he is entitled to have the company's property sold and his debt satisfied.

Chitty, Q.C., and *E. B. Cope*, for the company, and all the bondholders other than the Petitioner:—

We submit that the Petitioner is not a creditor of the company, and therefore not entitled to ask for a winding-up order. There is no covenant or undertaking by the company with the bondholder to pay him; according to the terms of the bond and the trust deed, which must be read together, the company's covenant is with the trustees, not the bondholder; so that the only persons who can sue on the bond are the persons with whom the covenant has been entered into, namely, the trustees, and the company can only be sued through them. This bond is not a promissory note, as in *In re General Estates Company, Ex parte City Bank* (1). Moreover, the Court should have regard to the wishes of the other bondholders, under the 91st section of the Act, and they unanimously oppose the petition. No benefit would accrue to any one from a winding-up order, and in fact the trustees will shortly be in a position to pay the arrears of interest.

Buckley, in reply:—

If the Respondents' contention is right, a bondholder cannot get paid, or sue for his debt, without the instrumentality of the trustees; but it cannot have been the intention that a bondholder should only sue through the trustees; it must have been intended that he should have a direct security as against the company to whom the money advanced was paid. No authority is to be found in which the rights of a holder of a bond of this kind have been defined, but whatever may be the bondholder's strict rights at law,

(1) Law Rep. 3 Ch. 758.

M. R. 1879 — *In re* URUGUAY CENTRAL AND HYGUERITAS RAILWAY COMPANY OF MONTE VIDEO.

I submit that in equity the amount secured to him by the bond should be considered as a loan to the company, and that he is therefore entitled to be considered a creditor of the company.

JESSEL, M.R.:—

I am not satisfied that the Plaintiff is a creditor. I should have been very glad if I had received more assistance from Mr. *Buckley* in his argument as to the rights of a person under a deed to which he is not a party, than he has given me; but in the absence of any authority I am not prepared to hold that this form of document, this bond, makes the person who holds the bond, or who holds the coupon, a creditor either at law or in equity.

The company seems to have been formed for making a railway in a South American Republic, and they raised money for making the railway from the public, not by way of loan, as Mr. *Buckley* puts it, but by way of money paid for bonds or debentures and shares. Everybody who advanced £100 got a share, called a "bonus share," and a bond, and that is how the money was raised.

There is therefore no independent loan. That is quite clear when you come to look at the terms of the deed. If the Petitioner was, as he is represented to me to have been, an original holder of bonds, he must have had the shares too. That being so, there is no contract for a loan. It is a subscription of capital which is invested in shares and in bonds; and it appears to me that the rights of the bondholders could only depend on the instrument under which the bonds were issued. The instrument securing the rights as bondholders is the same instrument which gave them a right to the bonus shares, and it provides, in effect, that subject to certain payments to be made by the contractors, while the line is being made, to keep down the interest and so forth, the trustees for the bondholders are to have a charge on the line of railway and also the security of the covenant entered nto by the company with the trustees to pay the trustees sufficient money to keep down the interest, and also to form a cumulative fund for paying off the capital. Then there is a direction that the trustees shall apply the money accordingly.

There can be no question that upon that deed the holders of the bonds are not creditors: they are merely *cestuis que trust* of a

charge, having a right, no doubt, to put their trustees in motion to compel payment under the covenant, but not having any independent right to sue the company either at law or in equity.

Then comes the question as to whether the form of bond issued under the deed gave them that right. Now it is a very odd instrument indeed. As I said before, I should have been glad if I could have been referred to any case in which such an instrument has been adjudicated upon: I am not aware of any; and from Mr. *Buckley's* great knowledge of these matters I think I may say there is none. He certainly would have produced one if one could have been found.

It is a very peculiar document indeed, but that it was not intended to make the company liable to be sued, I think is very plain. It begins by saying it is a first "mortgage bond"—using two terms which are not quite consistent, still there is the term —a "mortgage bond." Then, after stating that it is part of a sum of £1,200,000 represented by bonds similar to the present bond issued under the deed of trust of January, 1873, as varied by the indenture of December, 1873, it says, "Whereby the capital amount represented by the said bonds, and the interest and sinking fund thereon are declared a first charge on the railway and other property of the company therein mentioned, such bonds in respect of such charge ranking *pari passu* amongst themselves notwithstanding any priority of issue, date, or registration."

That is an important clause, and is pretty good evidence, standing alone, that it was not intended to be a bond enforceable by any one for his own benefit; because, if one of the bondholders could sue, he could only get judgment on behalf of all. They are *pari passu* bonds. Of course, it never could have been meant that one should be able to get judgment for himself. Even in cases where it has been held that debts are created by these instruments, one bondholder cannot, by getting a judgment, get paid in priority to the other bondholders.

Then the bond goes on to say—and this is a difficult clause—The company "in consideration of £100 owing by them on the security of this bond, hereby covenant," and so on. Now we must go back to the deed and see what is owing by them on the security of the bond. By the 15th clause the company is to issue

M. R. 1879 *In re* URUGUAY CENTRAL AND HYGUERITAS RAILWAY COMPANY OF MONTE VIEDO.

15,000 ordinary shares and deliver them to the trustees "for the purposes hereinafter expressed;" and then it says that 12,000 of them shall be retained by the trustees "as bonus shares, and shall be applied as bonus shares in connection with the issue of the said bonds as herein provided."

Then the deed goes on to say that the interest on the bonds shall be provided by *Waring Brothers* till the completion of the railway, in order to enable the trustees to pay the interest. There is also a provision in the deed for issuing a bonus share to the holder of each bond: that is contained in the 5th clause, which is as follows:—[His Lordship read it, calling attention to the fact that the interest was not made payable to the bearer of the bonds, but to the bearer of the coupons, which might be detached from the bonds. He then continued:—] Thus, in fact, the bondholder gets for his money a share as well as a bond. That being his position, there being a charge on the railway for the bond debt and interest in favour of the trustees, the bond contains a covenant by the company with the trustees to pay to the holder of the bond the principal, and to the holder of the coupons the interest. The covenant is in these words [His Lordship then read the covenant and continued:—] So that this is a covenant with the trustees that the company will pay, according to the provisions of the deed, interest to the bearer of the coupon, which is the interest now being sued for. When you look at the provisions of the deed, the mode of payment is, for the company to pay to the trustees who are to pay to the bearers of the coupons. So that it is not a covenant to pay to the bearers direct, but to pay through the trustees under the provisions of the deed.

Now, I cannot imagine that this document can give either the bearer of the coupons as regards interest, or the bearer of the bond as regards principal, an immediate right of action for money lent or for money due. It is not the meaning of the transaction. The whole transaction means this, that both the share and the bond are issued as a mode of securing to the person advancing the money for making the line certain benefits, and he takes the benefits as they are given to him. That does not appear to me, as I said before, to create any direct debt from the company. In fact it is hardly possible it can be so, because the company is liable to pay

the trustees under the deed, and they cannot be sued twice over. Are they to have two actions brought, one by the trustees, and the other by the holder of the coupon; and are they to be liable to every person who cuts a coupon off a bond to an action, simply because he is the holder of a coupon? It does not appear to me that it was the intention of the parties, which, after all, is the governing rule in deciding questions of equitable debt, to create a debt for which the holder of the coupon could sue directly. I think, therefore, that the holder of the coupon, who claims now for interest unpaid, is not a creditor either at law or in equity within the meaning of the Companies Acts.

But there is another ground on which I think also the petition should be dismissed, and it is this, that bondholders to the amount of £142,700 have instructed counsel to appear for them to oppose the petition. Now under the 91st section it has been decided that the Court may have regard to the wishes of persons opposing a winding-up petition. It has been decided that the section authorizes the Court even to refuse a winding-up order. I agree that, as a general rule, a creditor is entitled to a winding-up order *ex debito justitiæ;* but that rule is not without an exception; and if ever there was a case of exception, I think I have it here. Supposing my view of the nature of the instrument is not correct, and that the Petitioner is a creditor of the company, he is a *pari passu* creditor with the others; that is, he has only £600 compared with £142,700, and he has not got a single person to support him. He has £600 compared with £142,700, the holders of which large amount actually appear to oppose him. He then being a *pari passu* creditor can only sue on behalf of himself and all the other creditors. Any judgment that could be obtained by a winding-up order or otherwise is to enure to the benefit of all. If ever there was a case in which the Court might say that it should have regard to the wishes of the creditors, I think we have it here. Mr. *Buckley* did not suggest they were not fairly represented, nor did he desire that a meeting should be called.

But then I have to look also to the circumstances of the case, and though I should have regard to the wishes of the creditors, I must also see what sort of case it is in which they express their wishes. Now the matter stands in this way. The railway earns

M. R.
1879
In re URUGUAY CENTRAL AND HYGUERITAS RAILWAY COMPANY OF MONTE VIDEO.

something, and the trustees divide all they can from that. The Government of this Republic of *Uruguay* has guaranteed the payment of the interest to a certain extent, and has not performed its guarantee. There is no means of suing the Republic, or making the Republic pay, but there is some expectation that when the Republic is in funds, as it is to be hoped will be shortly the case, it will pay. Therefore it appears to me that the Petitioner will never get anything more by a winding-up order than he is getting now. He can only get the income. He could not sell the concessions under the winding-up order, because there is certainly a trust vesting in these trustees, a charge over the railway which would come first: the trustees would therefore have a right to take possession of it, so that a winding-up order could not enable him to realize money by sale which would be applicable to the payment of his debt, and he could not obtain anything more than putting the official liquidator in the place of the trustees to receive whatever comes from *Uruguay*, and divide it rateably amongst the creditors. So that he could actually get nothing beyond what he is getting now, and he would inflict no doubt, a very serious loss in costs upon his fellow creditors or mortgagees by getting a winding-up order.

Looking at the peculiar circumstances of the case, and seeing what has been decided by the authorities, and having regard to the wishes of the creditors in the matter, I think, on the second ground, the Court will properly exercise judicial discretion by refusing the order; and I therefore dismiss the petition with costs.

Solicitors: *Stevens & Harries; Cope & Co.*

ARTHUR *v.* MACKINNON.

M R.
1879
May 5.

[1879 A. 74.]

Will—Gift—Specific Chattels—Power to appropriate such Parts as Legatee should desire.

Gift by a testator of his plate to trustees upon trust to permit his widow "to have and appropriate absolutely to herself such parts thereof as she should signify in writing her desire to possess":—

Held, that the widow was entitled to the whole of the plate.

SIR *FREDERICK LEOPOLD ARTHUR*, deceased, by his will dated in 1878, bequeathed all his plate and plated articles (except as therein mentioned) to trustees upon trust to permit his wife "to have and appropriate absolutely to herself such parts thereof as she should at any time before the expiration of twelve calendar months after his decease signify in writing her desire to possess;" and, subject to such right of his said wife, upon trusts for his two children, one of whom was an infant.

This was an action by the widow against the trustees and the two children to have it declared that she was entitled to the whole of the plate and plated articles.

Methold, for the Plaintiff:—

I submit that the Plaintiff is entitled to the whole, and I rely on *Cooke* v. *Farrand* (1), though *Kennedy* v. *Kennedy* (2) seems to be an authority the other way.

F. T. Procter, for the children, and

G. P. Leach, for the trustees, cited *Jarman* on Wills (3).

JESSEL, M.R.:—

I have no doubt as to the meaning of this will. Of course the widow takes the whole.

Following the words literally she might take the whole of the plate with the exception of one article of probably no value, when the maxim *de minimis* would apply.

Solicitors: *Wynne & Son.*

(1) 7 Taunt. 121. (2) 10 Hare, 438. (3) 3rd Ed. vol. i. p. 335.

V.-C. B.
1879
March 23.

In re NORWICH PROVIDENT INSURANCE SOCIETY.

BATH'S CASE.

Winding-up—Contribution—Past Members—Companies Act, 1862, *s.* 38, *sub-s.* 3.

13 Ch D 694

By resolutions and arrangements which had been declared to be *intra vires* by the Court of Appeal (1) a life assurance society extended its business to fire policies. Separate (B) shares were issued in respect of the fire department, which was kept as a distinct business with separate books from the life department; and by the fire policies it was provided that all claims in respect thereof should be paid out of such of the capital, stock, and funds as were expressly applicable to the fire insurance department.

A call having been made for the purpose of meeting claims in respect of the fire business:—

Held, that the contributions of the existing B (fire policy) shareholders having been exhausted, past members of the B. class were liable to contribute without calling on the A (life policy) shareholders whose liability in respect of fire claims had been expressly excluded under the arrangement which had been already treated as valid by the Court of Appeal.

Revd on app 13 Ch D 693 CA

ADJOURNED summons on the part of the liquidator of the *Norwich Provident Insurance Society* for the purpose of enforcing against *E. A. Bath*, as a past member, a call of 15*s.* per share made on the 8th of July, 1878, on 2000 B shares held by *Bath* in the company.

The *Norwich Provident Insurance Society* was established in 1860 (and on the passing of the *Companies Act*, 1862, registered under it), for the purposes of life insurance, insurances on any contingency connected with sickness or health, survivorship and the like.

In March, 1872, a resolution was passed at a special general meeting empowering the directors to add fire insurance and fidelity guarantees to the business of the company.

In order to provide for this new branch of business, which was treated in every respect as distinct from the life business, a new and distinct issue of B or fire shares was made, which were treated in every respect as separate and distinct shares, and separate accounts and books were kept in respect of these shares and of the fire business. A separate form of policy was employed

(1) See *Bath's Case*, 8 Ch. D. 334.

by the company for insurances against loss by fire, providing (subject to the conditions printed on the back of the policy) that, in case of destruction of, or damage to, the insured property by fire, while the policy was on foot the society would "out of such of their capital, stock, and funds as are expressly applicable to the fire insurance department of the said society, pay or make good all such loss or damage, &c."

The first condition indorsed upon the policy was as follows:— "It is expressly stipulated by the society that no trustee, officer, or shareholder, his or her executors, administrators, or assigns, shall by reason of this instrument or policy or otherwise be personally liable for any claim under that policy except for the payment into the general funds of the said society of the unpaid part of his or her particular share or shares."

Mr. *Bath* took 2000 B shares which were allotted to him in July, 1873.

Doubts having arisen as to the validity of these proceedings, the society resolved to form a new company for the purpose of taking over the fire insurance and fidelity guarantee department of their business. A company was accordingly registered in September, 1873, under a memorandum and articles, together with an agreement by which it was provided that the society should assign to the company the benefit of all agreements relating to the fire department, and that the company should take over all policies against fire and guarantees for fidelity which had been issued by the society, and indemnify the society against them. It was also provided that the company should issue to the society or its nominees 30,589 £1 shares in the company, credited with the respective sums paid by the holders of the B shares, in substitution for such B shares and not in any case by way of additional profit or bonus, it being the intention of the parties thereto that the respective holders of B shares in the society should thenceforth be holders of shares in the *Fire Company* and be credited with the several amounts paid by them in the society, which last-mentioned shares the society thereby undertook to cancel.

Bath applied for 2000 shares in the *Fire Company*, which were on the 24th of February allotted to him, and he was credited in

V.-C. B. 1879 BATH'S CASE.

respect of them with the £500 which he had paid on his B shares. On the same 24th of September, 1873, his B shares in the society were annulled. On the 25th of April, 1874, a resolution was passed, and on the 30th of May confirmed, for winding up the society voluntarily; and on the 1st of July, 1874, an order was made for continuing the winding-up under supervision.

Mr. *Bath's* name having been settled on the list of contributories of the society, an application to remove it was on the 2nd of August, 1877, refused by Vice-Chancellor *Bacon* at Chambers. On appeal, Mr. *Bath's* name was retained on the list of contributories of the society, as a past member only, his membership having ceased on the 24th of September, 1873 (1).

A call had since been made by the liquidator in respect of the B shares in order to provide funds for liabilities arising in respect of fire policies and the business of the fire department, and for no other purpose. Mr. *Bath's* case had been selected as a test case upon the question whether the liabilities in respect of the fire business of the society were to be borne by the holders of A (life) shares as well as by the holders of B (fire) shares, or whether, having regard to the terms of the fire policies, the holders of B shares (past and present) were alone liable to contribute in respect of such liabilities.

In his evidence Mr. *Alexander*, the liquidator, stated in effect that from some of the fire or B shareholders having paid up the full amount due on their shares, while others were mere paupers from whom nothing could be recovered, the contributions of existing members of that class were exhausted, so that it was necessary to make this call on past members of the class. With respect to the life or A shareholders, assuming that they were liable in respect of fire claims, for which alone the present claim was made, it was admitted that their contributions were not exhausted.

Hemming, Q.C., and *T. Brett*, for the official liquidator:—

Mr. *Bath*, by the judgment of the Court of Appeal, has been declared liable as a past member of the B or fire class; and where, as here, there are no existing members of the fire department who are liable to pay, or, being liable to pay, from whom

(1) See *Bath's Case*, 8 Ch. D. 334, 343.

anything can be recovered, then, beyond all question, as all the existing members have been exhausted, past members are liable: *Creyke's Case* (1); *Companies Act*, 1862, s. 38, sub-s. 3.

Ingle Joyce, for Messrs. *Butterworth*, the principal creditors on the fire department, who had recovered judgment in 1873, asked for such an order as would enable them to obtain the amount due to them.

Sir *H. Jackson*, Q.C., and *Seward Brice*, for Mr. *Bath*:—

Before Mr. *Bath* can be made liable as a past member to contribution the Court must be satisfied that the existing members are not liable, or if liable, that such liability cannot be enforced against them from their being unable to satisfy the contributions required from them. It is attempted to distinguish the liability upon fire from that on life policies, and to treat the fire and life departments as two separate and distinct companies with different shareholders. But the company is one and indivisible, not made up of several series of companies; and as the creation of fire shares has been decided by the Court of Appeal case (2) to have been an act *intra vires*, so as to give a right against the whole assets of the company, the existing members, whose contributions, by the admission of the liquidator, have not been exhausted, must contribute to the fire as well as to the life policy debts, and the assets thus recovered by the liquidator are to be applied *pari passu* in payment of all the creditors, without any distinction: *Morris' Case* (3); *Webb* v. *Whiffin* (4).

Hemming, in reply:—

It is expressly provided in the fire policies that the assets of the fire department shall alone be liable to answer any claim in respect thereof, and the holders of life shares are liable for claims in respect of life policies only, and those are the only debts to which they can be required to contribute. Holders of life shares cannot, therefore, be included in the estimate of existing members on whom the contribution required by this call can be made.

(1) Law Rep. 5 Ch. 63.
(2) See 8 Ch. D. 334.
(3) Law Rep. 7 Ch. 200.
(4) Ibid. 5 H. L. 711, 718, 721.

V.-C. B. 1879 BATH'S CASE.

Claimants under fire policies are not creditors of the A shareholders at all.

BACON, V.C.:—

No doubt a very ingenious argument has been suggested on the words of the Act of Parliament. In the Act there is no distinction about the subdivision of companies, nor any division of companies into classes, but it provides—as we should expect the Legislature would provide—first, for the satisfaction of the debts to the creditors of the company and others, and, later on, provides for settling all questions which may exist between the contributories with respect to their several rights. But is there anything in the Act of Parliament which says that what has been done in this case—supposing it is a subdivision, supposing it is a creation of two companies—is unlawful? The company have the management of their own affairs, and it seems good to them at a certain time to create two separate departments, life insurance to be treated as one, and fire insurance to be treated as another; and that there may be no doubt about their respective rights, as well as their respective liabilities, a stipulation is to be inserted in the written contract with their creditors that the life policy holders shall only have recourse to certain portions of the property, and the fire policy holders shall have recourse to certain other portions of the property. Is there anything unlawful or unreasonable in that stipulation? Then comes the winding-up, and then the rights of the creditors are to be respected; and also, and not less, the rights of the shareholders *inter se*. Now the rights of the creditors are plain. No fire policy holder can ask for any portion of the general funds of this company, for that is contrary to the contract. No judgment recovered by Messrs. *Butterworth* can alter the law in that respect. They may have got a judgment, and may say it is a judgment against the company, and I will not go behind the judgment. What is to be done with that will be settled hereafter. I have nothing to do with that, except to listen to the complaint that they very reasonably make, that being unquestionably creditors of the company, and naturally desiring payment of their debt, they are postponed, baffled, thwarted, because of the proceedings which have taken place under this

winding-up. Then the liquidator, whose duty it is to hold an even hand, to deal impartially with the subject before him, is called upon to provide money to pay for these fire policies. He collects all that he can; he exhausts all the persons who are liable to pay in respect of the fire policies, and he finds—and the fact is proved beyond all question—that it is now necessary for him, in the discharge of his duty and in justice to the creditors, to call upon Mr. *Bath* (as a past shareholder) to pay up that which, according to his plain contract, he is liable to pay. Not involving him in any further liabilities with the company, he asks that he should only pay up what is due on the shares applicable to the fire policies for which he is liable. If I could find that it was unlawful for the company to do what they have done, if this mode of conducting business were open to reproach or suspicion, I should be glad to avail myself of the argument that has been addressed to me. But I find everything has been done in a perfectly straightforward manner. It was investigated by this Court and the Court of Appeal, and there no objection whatever was taken or suggested to what had been done. There can be no doubt about the limits and extent of the liabilities which are entered into by these policies. The account which the liquidator has given in his cross-examination has been very explicit, and to me perfectly satisfactory. It satisfies me that the other persons mentioned in his list are unable to pay; and he cannot discharge his duty unless he is at liberty to summon Mr. *Bath* and to require from him payment of the sum which is mentioned in the call.

It was arranged that, this being a test case, the costs should come out of the *Fire Company's* estate.

Solicitors: *Tillyard; Valpy, Chaplin, & Peckham.*

V.-C. B.
1879
Feb. 20.

BAGOT *v.* EASTON.

[1877 B. 211.]

EASTON *v.* BAGOT.

BAGOT *v.* EASTON.

Practice—Issues between Co-Defendants—Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XVI., *r.* 17.

14 Ch D 332-3

Plaintiff jointly with Defendant *B.* entered into a contract with Defendant *E.* to work a trading adventure on lands belonging to *E.* Plaintiff by his claim alleged that *E.* had obtained the contract from him and Defendant *B.* by misrepresentation, and asked for rescission, and in the alternative for dissolution. Defendant *B.* delivered a pleading, which was at the same time his defence in the action, a reply to a counter-claim by *E.*, and a new claim as in an action against *E.* :—

Held, that he was entitled to prosecute in this action his claim against *E.*; and that delivery to the Defendant *E.* of the said pleading should be notice, under the statute, of the claim of Defendant *B.* against him.

Form of order considered.

MOTION.

The original action of *Bagot* v. *Easton* was commenced by writ issued on the 5th of May, 1877, by *Arthur Greville Bagot*, Plaintiff, against *Charles Easton* and *Charles Fitzroy A. H. Bagot*, Defendants. The statement of claim set forth that the Plaintiff *Arthur Bagot* and the Defendant *Fitzroy Bagot*, his cousin, agreed with the Defendant *Easton* to join him in an adventure or partnership on lands belonging to *Easton*, and that on the 15th of November, 1875, certain agreements were executed by the three parties; and the Plaintiff claimed a declaration that he was induced to execute the agreements, and to give or secure certain moneys, by the misrepresentations of the Defendant, and in ignorance of the true effect of the agreements; and asked to have the agreements delivered up to be cancelled; or in the alternative to have the partnership between the Plaintiff and the Defendants under the first agreement dissolved; and other relief.

On the 28th of November, 1877, the Defendant *Easton* delivered a statement of defence and counter-claim. By the former he denied that the Plaintiff was induced to execute the agreements by any misrepresentation on the part of him, *Easton*, or in ignorance of

their true effect; and by the latter he claimed damages against the Plaintiff and the Defendant *Fitzroy Bagot* in respect of their several breaches of one of the agreements.

On the 7th of January, 1878, the Plaintiff delivered a reply to the last-mentioned pleading, in which as to the statement of defence he joined issue with the Defendant *Easton;* and as to the counter-claim, objected that it was not rightly constituted, inasmuch as *Fitzroy Bagot* was not made a Defendant thereto.

Thereupon *Charles Easton,* on the 11th of January, amended his statement of defence and counter-claim by intituling it in *Bagot* v. *Easton* (by original action) and as between *Charles Easton,* Plaintiff, and *Arthur G. Bagot* and *C. Fitzroy A. H. Bagot,* out of the jurisdiction (by counter-claim).

On the same 11th of January *Charles Easton* joined issue with the Plaintiff *Arthur Bagot* upon his reply.

On the 6th of April a summons was taken out in the action and cross-action on behalf of the Defendant *Fitzroy Bagot* that he might be at liberty, under sect. 24, sub-sect. 3, of the *Judicature Act,* 1873, and Rules of Court, 1875, Order XVI., rule 17, to serve the Defendant *Charles Easton* with notice in writing of a claim which he, *Fitzroy Bagot,* had against the said *Charles Easton* arising out of the subject-matter of this action. This summons was ordered to be attended on the 10th of April.

On the 11th of April the Defendant *Fitzroy Bagot* delivered a pleading, intituled in the action, in the counter-claim, and in a new cross-action of *Bagot* v. *Easton.* This pleading was a statement of defence to the action, a reply to the counter-claim, and a cross-claim against the Defendant *Charles Easton*—all in one. By the latter he claimed to have one of the agreements set aside as between himself and *Easton,* and alternatively, in the event of the agreement not being set aside, damages for the breach of the same by *Easton.*

On the 17th of April the summons was heard in Chambers, and by the order then made, the Defendant *Easton* by his solicitor waiving any objection he might be entitled to take on the ground that no order was made to serve him with notice of the applicants' claim, the Judge did not think fit to make any order on the application, but the costs were reserved.

V.-C. B.
1879
BAGOT
v.
EASTON.

EASTON
v.
BAGOT.

BAGOT
v.
EASTON.

On the 26th of April the Defendant *Charles Easton* joined issue with *Fitzroy Bagot* upon so much of the pleading delivered on the 11th of April as purported to be the reply of the said *Fitzroy Bagot* to the counter-claim of *Charles Easton*.

The present motion was made on behalf of the Defendant *Fitzroy Bagot* that directions might be given as to the terms in which the order made on the 17th of April should be drawn up, and, if necessary, that the order might be varied or discharged.

V. Hawkins, for the motion :—

The object of the moving Defendant is to obtain the benefit of sect. 24, sub-sect. 3, of the *Judicature Act*, 1873, and of the Order XVI., rule 17. The pleading of the 11th of April which the moving Defendant has delivered, and which he seeks leave to be allowed to prosecute, is not technically a counter-claim: *Furness* v. *Booth* (1); it is in the nature of a cross-claim.

The practice of the Master of the Rolls was very clearly stated by his Lordship in a case of *Marner* v. *Bright* (2). We ask for an order in the terms of the order made in Chambers in *Marner* v. *Bright*.

(1) 4 Ch. D. 586.
(2) M. R. Nov. 15, 1878.

MARNER *v.* BRIGHT.

[1878 M. 113.]

THE following order had, on the 6th of August, 1878, been made in Chambers :—

"Upon application of the Defendant *John Bright Marner*, and upon hearing the solicitors for the applicant, and for the Plaintiff, and for the Defendants *R. Stather* and *O.* his wife, it is ordered that the delivery of the statement of defence of the Defendant *J. B. Marner* in this action to the Defendants *R. Stather* and *O. Stather* be notice to those Defendants under the *Supreme Court of Judicature Act*, 1873, sect. 24, sub-sect. 3, and under Order XVI., rule 17, of the *Supreme Court of Judicature Act*, 1875, of the claim of the Defendant *J. B. Marner* against the Defendants *R. Stather* and *O. Stather*, and that the questions in this action between the Defendant *J. B. Marner* and the Defendants *R. Stather* and *O. Stather* be determined in this action, and that the costs of this application abide the determination of the questions so to be determined between the said Defendants as aforesaid."

On the matter being mentioned in Court, the Master of the Rolls made the following observations :—

JESSEL, M.R. :—

The order made in Chambers is in the proper form. Such orders have been made several times in my Chambers.

When there are several Defendants to an action who wish to try between themselves an issue with which the Plaintiff has nothing to do, but which issue is germane to, and connected

H. Burton Buckley, for the Plaintiff, *Arthur Bagot*:—

The Plaintiff does not object to the issue between the Defendants being tried in this way.

Sir *H. Jackson*, Q.C., and *H. Fellows*, for the Defendant *Easton*:—

We oppose the application on two grounds—one of substance, the other of form.

This is called an issue between co-Defendants. In fact, it is nothing but the claim in the original action of *Bagot* v. *Easton* over again. The Defendant *Fitzroy Bagot* is not claiming any "remedy or relief over" against anybody within the language of rule 17 of Order XVI.; he simply ought to have been made a co-Plaintiff, and would have been so made but that he happened to be out of the jurisdiction, and this may be done, and ought to be done now. Now he is lying by, waiting the result of the litigation. If his cousin, the Plaintiff, should succeed, he will take advantage of his cousin's success; if the Plaintiff should fail, then he will retire, and we shall have no means of getting costs against him. Suppose the Plaintiff should dismiss his own action, our costs of the Defendant's claim will be irrecoverable.

In *Marner* v. *Bright* the order in Chambers was made without opposition; and it was in a subsequent proceeding that the Master of the Rolls incidentally stated what his practice was. In that case what the Master of the Rolls said was: "Then as regards the Defendants, if the Defendant against whom the order is proposed

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with, the matters in dispute, so as to be capable of being tried more cheaply, conveniently, and expeditiously together with the other issues, and the Plaintiff does not object, then the above form of order is made, to carry out the object of the Judicature Acts, and to decide finally on all claims connected with the subject-matter of the action.

If, however, the Plaintiff objects, I should not make such an order; for, in my opinion, it was not the intention of the Acts or Rules of Court that the Plaintiff should be embarrassed in his conduct of the action by trying issues between co-Defendants with which he has nothing to do.

Then as regards the Defendants, if the Defendant against whom the order is proposed to be made objects that the issue cannot be conveniently tried, and if I am of opinion that there would be no advantage in so trying the issue, I always refuse the application. When, however, I am of opinion that the questions between the co-Defendants can be more conveniently and cheaply tried in the action, then I usually make the order.

V.-C. B. 1879 BAGOT v. EASTON. EASTON v. BAGOT. BAGOT v. EASTON.

to be made objects that the issue cannot be conveniently tried, and if I am of opinion that there would be no advantage in so trying the issue, I always refuse the application." That shews that the Plaintiff's consent does not make the order an order of course; and we say further that there will be no advantage in trying the issue in the way proposed, because issue has been joined in what is substantially the same action ever since the 26th of April.

BACON, V.C. :—

It has been said that the practice in this class of cases is new; but all practice must have a beginning.

The Plaintiff desires to have an agreement set aside on an allegation which amounts to a charge of fraud. He claims to have certain agreements set aside on the ground that he was induced to execute them under a misrepresentation by the Defendant, and in ignorance of their true effect. Upon this claim a Defendant comes forward and says: "Certain rights arise upon this claim as between myself and my co-Defendant." It cannot be disputed that such a statement as this on the part of a Defendant presents a cause of action.

The language of the Act of Parliament is perfectly plain. What the Act says is this. [His Lordship read the 3rd sub-section of sect. 24, and continued :—]

That enactment obliges the Court to give to a Defendant all such relief as he shall have properly claimed by his pleading, and which relates to or is connected with the original subject of the cause, and gives the Court power to make the order.

Now the Defendant *Fitzroy Bagot* has pleaded a very proper plea, raising the question, and he asks that that question may be tried and determined by the Court, and then the 3rd rule of Order XIX. points to this very clearly. [His Lordship read the rule, and continued :—]

All that is required is an order of the Judge directing that service of the pleading shall be due "notice in writing" to the person claimed against, of the Defendant's claim. But then the Defendant *Easton* complains that he may be under some disadvantage as to the recovery of his costs. I cannot conceive how any such difficulty should occur. The Court has full power to deal with any question of costs that may arise in the actions.

I think the questions raised upon these pleadings must now be put in course of trial. The Defendant *Fitzroy Bagot* makes an application that an order may be made under the 24th section. I think the order ought to be made; and when I find the Master of the Rolls saying that his practice is usually to make the order when the question between the co-Defendants can be more conveniently and cheaply tried in the action than in any other way, I am confirmed in the opinion that I have formed for myself.

The order will be in the form of the order in *Marner* v. *Bright* (1). The Defendant *Easton* will have liberty within fourteen days to deliver such statement of defence or other pleading in the second action as he may be advised. The costs of this application will be costs in the new action, except that the Plaintiff's costs of this application will be costs in the original action.

The following are minutes of the order as drawn up:—

Order of the 17th of April, 1878, to be discharged.

Order that the Defendant *Charles Fitzroy A. H. Bagot* be at liberty to prosecute in this action his claim against the Defendant *Charles Easton* delivered on the 12th of April, 1878; and that the delivery of such claim be treated as notice to the Defendant *Charles Easton* under sect. 24, sub-sect. 3, of the *Judicature Act*, 1873;

Order that the Defendant *Charles Easton* do have fourteen days after the date hereof to put in a defence to the said claim;

Order that the costs of the Defendants *Charles Easton* and *Charles Fitzroy A. H. Bagot* of this application be costs in the said cross-claim; and that the costs of the Plaintiff *Arthur G. Bagot* of this application be costs in the original action.

Solicitors for Plaintiff: *Lucas & Coe.*

Solicitors for Defendant *Easton*: *Cookson, Wainwright, & Pennington.*

Solicitors for Defendant *Fitzroy Bagot*: *Farrer, Ouvry, & Co.*

(1) *Ante*, p. 394, n.

Distinguished. BARRATT *v.* GOUGH-THOMAS. [1951] 2 All E.R. 48.

V.-C. H.

1879

March 14, 15.

JAMES *v.* RUMSEY.

[1877 J. 54.]

Mortgage of Leaseholds—Deposit of Title-deeds with Mortgagee's Solicitor—Fraudulent Dealing by Solicitor with Indenture of Lease—Redemption—Indemnity—Compensation—Interest—Costs—Action to recover Deed.

A. B., possessed of leasehold premises for a long term, in February, 1872, mortgaged them to trustees, and handed to their solicitor the indenture of lease and other title deeds. On the 25th of September, 1876, it was arranged between the parties that *A. B.* should redeem at once, he paying with the principal moneys three months' interest in lieu of the usual notice. It was afterwards discovered that the trustees had not in their possession the indenture of lease, and therefore *A. B.* could not safely redeem.

After *A. B.* commenced this action he was informed, and the fact was certified by the Chief Clerk, that the trustees' former solicitor had fraudulently deposited the deed to secure moneys lent to him.

A. B. alleged that he had sustained damage in being prevented from redeeming, and claimed an account; a reconveyance of the premises and a delivery of the title-deeds; and if the indenture of lease were lost, an indemnity in respect of the loss; an attested copy of the deed, and compensation, and costs:—

Held, that the Plaintiff should have liberty to bring an action to recover the deed; that if he could not recover it he would be entitled to an indemnity; that he was right in coming to the Court to have the matter inquired into and his title made clear; and that he was entitled to all his costs of the action, but that he was not entitled to any compensation for the loss of the deed; and that, in accordance with the arrangement made in September, 1876, only three months' interest ought to be paid.

TWO houses and premises situate at *Bournemouth* were, by an indenture of lease dated the 25th of April, 1867, demised by Sir *George E. M. T. Gervis* to the Plaintiff *Nicholas James*, for a term of ninety-nine years from the 24th of June, 1865.

By an indenture dated the 6th of February, 1872, the Plaintiff, in consideration of £530 advanced to him at £5 per cent. by the Defendants *Rumsey* and *Smith*, demised to them, their executors, &c., the same premises for the same term, less ten days, but subject to redemption.

The Plaintiff at the time of executing the mortgage deed delivered to *William Reade*, of *Ringwood*, the solicitor and agent of the Defendants, the title-deeds relating to the premises.

In September, 1876, the Plaintiff was desirous of redeeming the mortgage, and his solicitor gave the Defendants notice that he wished to redeem at once, and requested them in lieu of notice to accept three months' interest, and their solicitors on their behalf on the 25th of September, 1876, consented to accept the mortgage money and three months' interest at once in lieu of notice. The Plaintiff's solicitor, a few days after such notice had been given, went to the Defendants' solicitors' office to inspect the title-deeds with a view to preparing a transfer of the mortgage, and he then discovered that the Defendants had not in their possession the indenture of lease of 1867. The Defendants represented to the Plaintiff that it was lost, and he, in his statement of claim, alleged that if lost it was lost whilst in the possession of the Defendants and through their negligence, and that in consequence of the loss he was prevented from redeeming the mortgage. The Plaintiff in October, 1877, some months after this action was commenced, was informed that the indenture of lease was not lost, but that *William Reade* retained possession of it until the 25th of August, 1876, when he fraudulently deposited it with Mrs. *Giles* to secure the repayment of £250 advanced by her to him, with interest at £6 per cent.

The Plaintiff alleged that before the action he offered to redeem the mortgage, notwithstanding the alleged loss of the deed, if the Defendants would furnish at their expense an attested copy of it, and would make proper compensation to him for such loss, and execute to him a satisfactory indemnity, but the Defendants refused to do that; and he also alleged that he had sustained considerable damage in being prevented from redeeming, and he claimed that an account might be taken, and that on payment of what was due the Defendants might be ordered to surrender the premises to him and assure the same as he might direct; and to deliver up the title-deeds, and if it were proved that the deed was lost, that the Defendants might be ordered to execute at their own expense to the Plaintiff a proper indemnity in respect of such loss, and at the like expense an attested copy of the deed; and he also claimed compensation for damages, and the costs of the action.

The Defendants were the trustees of a will, and the £530 formed

V.-C. H. 1879 JAMES v. RUMSEY.

part of their testator's estate. *William Reade* acted for them as their solicitor in the management of that estate. They denied that the Plaintiff had suffered any damage, and alleged that they were able and willing to make a good title to the premises and to reconvey them to the Plaintiff, and to indemnify and compensate him for the non-production of the deed, and that the non-production did not justify him in refusing to redeem.

They also stated that in August, 1875, they filed a bill against *William Reade* for an account of the trust estate, and for the delivery up of all deeds; and they admitted their liability to indemnify and compensate the Plaintiff, and offered to give him a bond of indemnity, but the solicitors of the parties could not agree upon the form of it. The Defendants offered to make compensation to the Plaintiff for any damage actually sustained.

This action was tried in March, 1878. In pursuance of directions then given the Chief Clerk certified that in addition to the principal the interest due to the 1st of January, 1877, was £10 12*s.* 2*d.*, and a further sum to the date of the certificate, making a total of £592 18*s.* 10*d.*; that the indenture of lease was deposited with *William Reade*, as the solicitor of the Defendants, and was allowed by them to remain in his possession; and that, he in August, 1875, in the manner mentioned in the certificate, fraudulently deposited it with Mr. *Poole*, the solicitor of Mrs. *Giles*, as security for the sum mentioned above, and that it was still in that solicitor's possession.

The Chief Clerk also certified that the indemnity which ought to be given by the Defendants to the Plaintiff, by reason of the non-delivery of the deed, consisted of a bond conditioned for payment of £1060, the draft of which had been settled by the Judge.

The recitals in the bond settled in Chambers were the indentures of lease of 1867, and of mortgage of 1872; that the former was handed over by the Plaintiff to the Defendants as they thereby acknowledged; and that the Defendants had waived notice by the Plaintiff of his intention to redeem the premises, and a transfer of the mortgage. "And whereas previously to the execution of the said last mentioned indenture it was agreed that for the satisfaction and indemnity of the said *Nicholas James*, the Defendants should execute the above written bond, subject to the

condition hereinafter contained, Now the condition of the above bond is such that if the said *Henry Rumsey* and *Frederick Smith*, or either of them, their or either of their heirs, executors, or administrators, shall at all times hereafter keep indemnified the said *Nicholas James*, his heirs, executors, administrators, and assigns, and his and their estate and effects, and the hereditaments and premises comprised in the said recited indenture of lease, against all actions, claims, loss, costs, damages, charges, and expenses, and other consequences which the said *Nicholas James*, his heirs, executors, administrators, or assigns, or the said hereditaments and premises, shall or may incur, sustain, or become liable to, for, or by reason or on account or in respect of the said loss or non-delivery by the said *Henry Rumsey* and *Frederick Smith* to the said *Nicholas James* of the said indenture of lease in any manner whatsoever, and against all actions, claims, loss, costs, damages, charges, and expenses whatsoever, to which the said *Nicholas James*, his heirs, executors, administrators, or assigns, estate or effects, is or are or shall or may become subject or liable in case it shall appear that the said indenture of lease has been deposited with any person or persons by way of security, or has been otherwise dealt with in such a manner as to prejudice or affect the title of the said *Nicholas James* to the premises comprised in such lease, or any part thereof, then the above written bond shall be void, otherwise the same shall remain in full force."

W. Pearson, Q.C., and *Maclean*, for the Plaintiff, after stating the facts, submitted that the Defendants ought to be ordered to deliver up the deed to the Plaintiff, as they knew where it was, and they ought to obtain possession of it. They had been guilty of negligence, but that was not material to the Plaintiff's case.

They referred to the cases of *Head* v. *Egerton* (1); *Lord Midleton* v. *Eliot* (2); *Woodman* v. *Higgins* (3); and *Luccraft* v. *Hite* (4).

Hastings, Q.C., and *Cope*, for the Defendants:—

It is denied that the Defendants were guilty of negligence. Where a deed, not being the mortgage deed, is stolen from the

(1) 3 P. Wms. 280.
(2) 15 Sim. 531, 535.
(3) 14 Jur. 846.
(4) 2 Hare, 14, n.

V.-C. H. 1879 JAMES v. RUMSEY.

mortgagee, he is not liable to give an indemnity for its loss, but if the mortgage deed be stolen, the case is different, and the mortgagee must indemnify the mortgagor, yet the Court never gives both compensation and indemnity.

[They referred to the cases of *Jones* v. *Lewis* (1); *Smith* v. *Bicknell* (2); *Shelmardine* v. *Harrop* (3); *Stokoe* v. *Robson* (4); *Lord Midleton* v. *Eliot* (5); *Hornby* v. *Matcham* (6); *Brown* v. *Sewell* (7); *Heath* v. *Crealock* (8); *Harrington* v. *Price* (9); and *Dobson* v. *Land* (10).]

The Plaintiff is precluded by the form of the order of March, 1878, from asking for the delivery of the deed. The Defendants offered before action a proper indemnity at their own expense, and an attested copy of the deed, and they ought not to be ordered to pay any costs. There ought not to be an order for a cesser of the interest as from the 1st of January, 1877, nor an award for damages, even if any have been sustained; but it is submitted that the Plaintiff is not entitled to any compensation as he has had the mortgage money since September, 1876, without paying any interest to the Defendants. No case has been made out either for relief from paying interest to the Defendants to the present time; or that the Defendants should pay any costs. The proper course would be to leave the parties to pay their own costs.

W. Pearson, in reply, contended that the authorities made no distinction between the loss of a mortgage and any other deed.

HALL, V.C.:—

The order which I now make upon the hearing of this action is, that the Plaintiff be at liberty to take such proceedings for the recovery of the deed as he may be advised, against the person who is named in the Chief Clerk's certificate, or such other person or persons as may be in possession of it. That is my present order.

(1) 2 Ves, Sen. 240.
(2) 3 V. & B. 51, n.
(3) 6 Madd. 39.
(4) 3 V. & B. 51; 19 Ves. 385.
(5) 15 Sim. 531.
(6) 16 Sim. 325.
(7) 11 Hare, 49.
(8) Law Rep. 10 Ch. 22.
(9) 3 B. & Ad. 170.
(10) 4 De G. & Sm. 575, 581.

As regards the different points which have been discussed upon the present occasion, the first is, whether, under the circumstances which appear here, this is a case in which the Plaintiff is entitled to an indemnity, supposing the deed cannot be recovered. It appears to me, after an examination of all the authorities, that it is a case in which the Plaintiff would clearly be entitled to an indemnity and that it should be framed in the form stated in the Chief Clerk's certificate. No exception has been taken to that certificate. It has been submitted that the loss of the deed was an innocent one on the part of the Defendants, and that under such circumstances no indemnity could be required. I do not find that that is the result of the authorities. There may be some peculiarity in the settled practice of the Court in respect to the loss of title-deeds as between mortgagor and mortgagee, making the case not exactly that of an ordinary liability of a bailee; but it seems to me, looking at the authorities, that a mortgagor is, under such circumstances as exist in the present case, entitled to an indemnity. That seems to me to be a fair result of all the cases which have been referred to, and therefore the Plaintiff was right in claiming an indemnity, and he was also, I think, right upon the decision of *Lord Midleton* v. *Eliot* (1) in coming to the Court to have the matter sifted and inquired into, for the purpose of establishing his title and having it made clear, so that he might be able to deal with the property in future. It has been contended that the Plaintiff is not entitled to any compensation, and it appears to me that upon the pleadings there is not at present any case made before me which establishes a right to compensation. The compensation claimed by the statement of claim is not for expenses incurred by the Plaintiff in respect of correspondence and communications which passed between the Plaintiff's and Defendants' solicitors in reference to the loss of the deed, but compensation in respect of the loss of the deed itself. It is first mentioned in paragraph 4 in the amended statement of claim thus: "The Plaintiff has suffered considerable loss through being prevented by the Defendants, as he has in fact been, under the circumstances hereinafter stated, from paying off the same and redeeming the said premises;" and next, in paragraph 6, in which

(1) 15 Sim. 531.

V.-C. H. 1879 JAMES v. RUMSEY.

it is alleged that, "In consequence of such loss a correspondence ensued between the Plaintiff's solicitors and those of the Defendants, and in that correspondence, and before the institution of this action, the Plaintiff offered to redeem the said premises, notwithstanding the alleged loss of the said indenture of lease, if the Defendants would furnish, at their expense, an attested copy of the said indenture of lease, and would make proper compensation to the Plaintiff for the loss, and execute to him a satisfactory indemnity in respect of such loss." That is a claim for compensation in respect of depreciation of the property, or other similar injury, by not being able to deal with it. It is compensation in respect of that, and not in respect of the alleged solicitors' expenses incurred in correspondence. In the prayer of the statement of claim, the 3rd paragraph is in these words: "Compensation for the damage done to the Plaintiff by the loss of the said indenture of lease, if in fact lost."—It turns out now that the deed is not lost—"and by reason of his being prevented, through default of the Defendants, from redeeming the said premises in September, 1876, and to set off the amount of such compensation against what is due from the Plaintiff to the Defendants."

It does not appear to me that the claim for compensation as now set up at the bar, and to which such claim is limited, is compensation coming fairly within the scope of those paragraphs of the statement of claim, and the 3rd paragraph of the prayer. Therefore the claim for compensation cannot be allowed. As regards the interest upon the mortgage money, it appears to me, considering the decision in *Lord Midleton* v. *Eliot* (1), also upon good sense, there having been an arrangement come to between the parties that the principal money, and also the interest up to that time, should be paid at once, *i.e.*, three months interest paid in lieu of notice. That arrangement was a very proper one to come to, and I see no reason why the Plaintiff, these difficulties having arisen through default, as I hold, of the Defendants, should not have the benefit of it, and therefore I think that the interest ought to stop on the 1st of January, 1877, that being the date which I approximately fix as the time for the interest to stop. Then as regards the costs of the action, I see no reason whatever for holding

(1) 15 Sim. 531.

otherwise than that this litigation has arisen through the default of the Defendants, and that they must bear the costs of it; and I say that, not forgetting what has been urged about the dispute as to the form of the indemnity. Considering what that dispute was, I cannot hold that the Plaintiff has, in regard to it, been so wrong as that the costs, or any portion of them, should be dealt with separately in reference to that part of the contest. There will therefore be no distinction, but all the costs of the action must be borne by the Defendants, and must be set off against what in the certificate has been ascertained to be due to the Defendants. So I determine these different points, having previously said what I think ought to be done, viz., that an action be brought by the Plaintiff to recover the deed; and I desire to add, that in my judgment the costs of the proceedings to recover it will have to be borne by the Defendants, unless indeed, from the course taken in those proceedings by either party, there should be any special ground for dealing with them otherwise; but of that I shall be better able to judge when the matter comes before me again. Therefore I do not finally dispose of those costs, but merely state what my view is, and what I shall act upon, and how, in the absence of special ground, I shall dispose of them ultimately. Further consideration of the action must be reserved, and there will be liberty to apply.

Solicitors: *Winter, Williams, & Co.*, agents for *G. J. Piercy, Bournemouth; Cope & Co.*, agents for *Pinniger, Wood, & Awdry, Chippenham.*

V.-C. H.
1879
April 4.

In re GRIMSHAW'S TRUSTS.

Will — Construction — Vesting — Gift of Income for Maintenance — Gift to Children at Twenty-one—Discretionary Power in Trustees.

Testator gave to trustees a sum of money upon trust to pay the income unto *A. B.* and his wife during their joint lives, and to the survivor for life, and after the decease of the survivor to apply the income thereof, or of so much thereof as they should think proper, in the maintenance, education, and bringing up of their child or children during their minorities, and upon their attainment to the age of twenty-one years to pay and divide the principal sum, with the accumulations thereof, unto and equally amongst such child or children, and in case there should be no child, unto *A. B.*, his executors, &c.

Two out of four children, the issue of the marriage, died infants without having been married, and one child attained the age of twenty-one years, and died intestate without having been married:—

Held, that the shares of the children did not vest till they attained the age of twenty-one years, and that the surviving child, who attained the age of twenty-one years and married, was entitled to the deceased children's shares.

Watson v. *Hayes* (1) followed, and *Fox* v. *Fox* (2) distinguished.

JOHN GRIMSHAW, who died in March, 1821, by a codicil made in November, 1819, after giving unto the three trustees appointed by his will, made in September, 1817, the sum of £3000 upon trust to pay the income unto his son-in-law, named, for life, and after his death to divide the principal sum amongst his three children as they should severally attain the age of twenty-one years, with benefit of survivorship, and giving a further sum of £2000 upon trust to apply the income, or of so much thereof as they should think proper, in the maintenance, education, and bringing up of those three children during their respective minorities, and upon their attainment of the age of twenty-one years to pay the sum of £2000, with the accumulations thereof, unto them or the survivor of them; gave unto the same trustees a further sum of £3000 upon trust to pay the income unto his son-in-law *Charles Greenway* and *Ann* his wife during their joint lives, and to the survivor of them during his or her life, and after the decease of the survivor of them to apply the income "thereof, or

(1) 5 My. & Cr. 125. (2) Law Rep. 19 Eq. 286.

of so much thereof as they shall think proper, in the maintenance, education, and bringing up of their child or children during their respective minorities, and upon their attainment to the age of twenty-one years, do and shall pay and divide the same principal sum, with the accumulations thereof, unto and equally amongst such child or children, and if there be no such child, unto the said *Charles Greenway*, his executors, administrators, or assigns." The testator made a bequest unto the trustees "of the further sum of £3000 upon the last-mentioned trusts for the benefit of my son-in-law *C. B. Walker* and *Dorothea* his wife and their issue, and in default thereof to the said *C. B. Walker*" absolutely; and a bequest of the further sum of £2000 "upon the same trusts for the benefit" of another son-in-law and his wife "and their issue."

C. B. Walker and *Dorothea* his wife had issue four children; first, *John*, who attained the age of twenty-one years and died in 1845, in the lifetime of his father, intestate and without having been married; second, *Penelope*, and third, *Elizabeth*, who died in the lifetime of their father, infants, and without having been married; and fourth, *Henrietta Louisa*, the wife of *Henry Stowe*, who had attained the age of twenty-one years and had survived her father (who died in January, 1878) and her mother (who died in 1826). Upon the marriage of Mr. and Mrs. *Stowe*, in 1855, her share of the fund was placed in settlement. The trustees of the will had paid the residue of the trust fund into Court, and this was a petition by Mr. and Mrs. *Stowe* and the trustees of the settlement asking for the payment of it out to the trustees.

The question upon the construction of the codicil was, whether the shares of the children vested before they attained the age of twenty-one years, or at that age.

Farwell, for the Petitioner:—

The bequest to the children did not vest in them absolutely till they should attain the age of twenty-one. In *Leake* v. *Robinson* (1) there was a gift of residue in similar terms, and the decision there practically governs this case. That case was followed by many others of the same class; and that of *Watson*

(1) 2 Mer. 363.

V.-C. H. 1879 *In re* GRIMSHAW'S TRUSTS.

v. *Hayes* (1), which was before Lord *Cottenham*, may be considered as directly in point. It should be noticed that there is not a mere gift for maintenance out of the whole income, but a gift of the whole or a part of it, and that is followed by a gift of the principal sum and of the accumulations, and it is submitted that there is no trust. The only decision which can be cited against the claim of the Petitioners is that of the Master of the Rolls in *Fox* v. *Fox* (2), where his Lordship commented upon and did not approve of the decision in *In re Ashmore's Trusts* (3), before Lord Justice *James* when Vice-Chancellor, and which was decided upon the authority of *Pulsford* v. *Hunter* (4); but the case of *Fox* v. *Fox* is quite distinguishable from the present, as there the gift of the capital came before the direction to apply the income for maintenance, and further, there was a gift over in case the children should not attain the age of twenty-one. In the case of *Spencer* v. *Wilson* (5), which was not cited in *Fox* v. *Fox*, there was a gift of income in trust for the benefit of children, and a direction to transfer the residue to them as they should attain the age of twenty-one, and Vice-Chancellor *Malins* held that the shares of the children did not vest till the age of twenty-one was attained. In that case, *Leake* v. *Robinson* (6), *Watson* v. *Hayes*, and many other cases, were discussed and followed. In *Fox* v. *Fox* the similar case of *Harrison* v. *Grimwood* (7) was cited, and the Master of the Rolls said it was a distinct authority in reference to the gift of income, and that Lord *Langdale* held that the bequest was vested, but the decision in that case has been commented upon adversely in *Hawkins* on Wills (8). It is therefore submitted that there was no vesting in this case till the age of twenty-one, and that the Petitioners are entitled to an order as prayed.

Humber, for the legal personal representatives of *C. B. Walker*, submitted that this case was governed by the decision in *Fox* v. *Fox*, where the Master of the Rolls held that a gift contained in a direction to pay and divide amongst a class at a specific age,

(1) 5 My. & Cr. 125, 133.
(2) Law Rep. 19 Eq. 286.
(3) Ibid. 9 Eq. 99.
(4) 3 Bro. C. C. 416.
(5) Law Rep. 16 Eq. 501.
(6) 2 Mer. 363.
(7) 12 Beav. 192.
(8) Page 229.

followed by a direction to apply the whole income for maintenance in the meantime, was vested, and not the less so because there was a discretion conferred on the trustees to apply less than the whole income for that purpose. The present case was similar to that of *Saunders* v. *Vautier* (1), where the gift of income preceded that of capital; therefore the Petitioners were not entitled.

Townsend, for the trustees.

HALL, V.C.:—

It appears to me that in this will there is no gift of any of the capital fund to any child who did not attain the age of twenty-one years. It may perhaps be considered to be a somewhat critical mode of construing wills like this one, to notice whether the gift of the capital fund comes first or whether the direction for maintenance does. In this will the direction for maintenance comes first, and that circumstance is one which, in the present state of the authorities, cannot be disregarded. The gift is one of a capital fund to trustees, and the first trust is to pay the income of the fund to the testator's son-in-law, *Charles Greenway*, and his wife, during their joint lives and the life of the survivor, and after the decease of the survivor to apply the income "thereof, or so much thereof as the trustees shall think proper, in the maintenance" of the children.

Stopping there, it is clear to my mind that the trustees were only to apply the income of the whole fund, or of so much of the fund as they should think proper; and if I am to be very particular in considering the words—and I do not know why I should not be—the direction is not that the trustees were to apply so much of the income of the whole fund, but to apply the income of the whole fund or of so much thereof as they should think proper: that is to say, looking at the words as I find them, it is not a trust for maintenance declared in respect of the income of the whole fund, but only of the income of the whole fund, or of so much as the trustees should think proper. If, for instance, the capital fund had been invested on different investments, including bank stock, the trustees might, if they thought proper, say that

(1) 4 Beav. 115; Cr. & Ph. 240, 248.

V.-C. H. 1879 *In re* GRIMSHAW'S TRUSTS.

they would only apply for maintenance the income of that part of of the fund invested in bank stock. It is impossible to hold, upon a fair consideration of the language of this will, that there is any trust declared of the whole income for the maintenance of the children. The first trust is not a gift of the capital fund itself, but a trust merely of income. Then when we come to that part of the will which deals with the capital fund, the trust is that upon the attainment by the children of the age of twenty-one years, the trustees are "to pay and divide the same principal sum with the accumulations thereof." That supposes that there would be some income not already disposed of and which was to go along with the principal fund; and there is then for the first time a trust of a sum which is treated as consisting of the original sum and so much of the income of it as should not have been disposed of under the preceding trust. These accumulations were to be added to the original sum, and then the aggregate sum so formed was to be paid and divided "unto and equally amongst such child or children, and if there shall be no such child," unto the testator's son-in-law absolutely. It may be said that the words "if there shall be no such child" refer to all the children who might come into existence, and not to those merely who might attain the age of twenty-one, but I cannot so construe the words, and I think that that would not be a reasonable construction. The trust is for the child or children upon his, her, or their attainment to the age of twenty-one years, and they are not to take unless they fulfil that description. It appears to me, therefore, having regard to the authorities, and particularly to the case before Lord *Cottenham* of *Watson* v. *Hayes* (1), that if I take the rule as there laid down, and also in *Leake* v. *Robinson* (2) and a multitude of other cases, there not being a trust in this case of the whole income for the benefit of the children, I cannot consistently with them hold that this direction for maintenance vests the capital fund; on the contrary, to do so would be in opposition to those cases, some of which were before the Court of Appeal. With reference to the decision of the Master of the Rolls in *Fox* v. *Fox* (3), it is sufficient for present purposes to say that the frame

(1) 5 My. & Cr. 125. (2) 2 Mer. 363.
(3) Law Rep. 19 Eq. 286.

and scheme of the disposition in that will were different. The first trust there was of the capital fund, and after the gift of that in the first instance to the children there followed as a sort of annex to that trust these words, "applying from time to time the income of the presumptive share of each child (if more than one), or the income of the whole if an only child, and so much thereof respectively as the trustees or trustee for the time being might think proper." I can understand in such a case where the trust in the first instance was a trust of the capital fund with a superadded provision for maintenance, although the words were "or so much thereof respectively as the trustees or trustee might think proper," that it might well be considered that in substance there was a trust of the whole income, with a mere authority given to the trustees to reduce the amount to be applied for maintenance—that there was in substance a trust of the capital fund and income for the children in the first instance. That distinguishes that case from the present. It seems to me that I cannot, without doing violence to the cases referred to, do otherwise than hold that this capital fund did not vest in any child until the age of twenty-one. Therefore the two children, who died in infancy, will be excluded from participation in it, and the fund in Court must be paid out as prayed by the Petitioners.

Solicitors for Petitioner; *Pritchard, Englefield, & Co.*

Solicitor for Respondent: *W. R. A. Kime,* agent for *Buck & Dicksons, Preston.*

Solicitors for Trustees: *Iliffe, Russell, Iliffe, & Cardale.*

FRY, J.

1879

March 17, 18, 19.

KNIGHT *v.* PURSELL.

[1878 K. 56.]

Party-wall—Metropolitan Buildings Act (18 & 19 *Vict. c.* 122), *ss.* 3, 88.

The Plaintiff was the owner of a boundary wall built on his own land, against which he had built some closets, and the Defendant, his adjoining neighbour, had recently built a substantial structure :—

Held, that, so far as these buildings extended against both sides of the wall, it was a "party-wall" within the *Metropolitan Buildings Act* (18 & 19 Vict. c. 122), and the Defendant was entitled, on giving the proper notices under the Act, to take down such part as might be necessary for the purpose of necessary rebuilding.

THE Plaintiff in this case was the occupier of leasehold premises Nos. 6 and 7, *Surrey Row, Blackfriars Road*, and the Defendant was owner of premises at 172, *Blackfriars Road*, situated to the south of the Plaintiff's boundary.

The Plaintiff's claim was for an injunction in respect of various alleged trespasses and injuries to his property, but the only point calling for a report was the following :—

The Plaintiff claimed an injunction to restrain the Defendant from pulling down or building upon or otherwise interfering with a wall belonging to the Plaintiff, and situate at the back of his premises, and for a mandatory injunction to compel the Defendant to pull down a building already erected by him upon the Plaintiff's said wall, and to restore the wall to its former condition.

On the 30th of October, 1877, after a fire which had occurred on the Defendant's premises, the Defendant, by his agent, sent the following notice to the Plaintiff :—

"I hereby give you notice, as required by the *Metropolitan Buildings Act* (18 & 19 Vict. c. 122), that it is intended to take down such portions of the party-walls, or all of the same, as may be necessary, which divide your premises from the above, and to rebuild the same according to the provisions of the *Metropolitan Buildings Act*, such said walls now being in a dangerous condition."

The Plaintiff's contention was that the wall in question was

built upon his own land only, and was his boundary wall, and not in any sense a party-wall.

On this point a considerable amount of evidence, both oral and by affidavit, was given, and the Court came to the conclusion that the wall did stand on the Plaintiff's ground only.

The evidence, however, established, in the judgment of the Court, that in September, 1849, a Mr. *Oakey*, who had occupied the Defendant's premises for about thirty years previously to the Defendant's occupation, put up a six-feet wooden fence on the south side of the Plaintiff's wall, which fence remained until 1868; that this structure was then taken down and a much larger one was erected, which consisted of a timber weather-boarding and a roof partly of tiles and partly of skylights; that the framework to which the boards were nailed and the roof fixed rested for its entire length on the wall, and was of the height of about fifteen feet above the wall.

On the Plaintiff's side of the wall there were some sheds and closets used by him.

Under these circumstances the question of law which arose was whether the Defendant was justified in treating this wall as a "party-wall" under the *Metropolitan Buildings Act*, as he had done by his notice of the 30th of October, 1877.

By the 3rd section of 18 & 19 Vict. c. 122, it is provided that a party-wall shall apply to every wall used or built in order to be used as a separation of any building from any other building, with a view to the same being occupied by different persons.

By consent the action was tried before the Court without a jury and without pleading.

North, Q.C., and *E. T. Holland*, for the Plaintiff:—

The wall with which the Defendant proposes to interfere is the Plaintiff's wall, built upon his ground, and it is in no sense a party-wall: *Cubitt* v. *Porter* (1); *Matts* v. *Hawkins* (2); *Standard Bank of British South America* v. *Stokes* (3).

Fischer, Q.C., and *Maidlow*, for the Defendant:—

The wall is a party-wall within the Act, for it stands between

(1) 8 B. & C. 257. (2) 5 Taunt. 20. (3) 9 Ch. D. 68.

FRY, J.
1879
KNIGHT
v.
PURSELL.

the buildings of adjoining owners; it is so used by each party as to make it a party-wall: *Stevens* v. *Gourly* (1); *Weston* v. *Arnold* (2); *Angus* v. *Dalton* (3); *Sheffield Improved Industrial and Provident Society* v. *Jarvis* (before Vice-Chancellor *Malins* on the 21st of November, 1871, and the Court of Appeal on the 28th of February, 1872).

North, in reply:—

A wall is not a party-wall unless both the adjoining owners have some property in it. It cannot be to the interest of the public that an owner of adjoining land shall have power by merely building a shed against his neighbour's outside wall, to make it a party-wall, and thereby to obtain rights over that wall under the *Metropolitan Buildings Act*.

In this case the Plaintiff or his predecessor in title did not build the wall "with a view to buildings on either side of it being occupied by different persons," which is the definition in the Act.

FRY, J., after stating the facts, and that the result of the evidence was to shew that the wall stood on the Plaintiff's ground only, and that no part of the Defendant's buildings had rested on the wall previously to 1868, continued:—

Prescriptive title to an easement being thus negatived, the question remains, has the wall in question between the property of the Plaintiff and the Defendant become a party-wall under the *Metropolitan Buildings Act?* It appears to me, on reading the definition of a party-wall contained in the 3rd section of the Act, that the intention is to define a party-wall, not by reference to the rights of ownership which the adjoining proprietors may have in any particular wall in dispute, but by reference to the mode in which the wall is used. It is a question, not of title, but of user. The object of the Act is to limit the acts of private owners for the general benefit of the public, to prevent the spread of fire, and for similar purposes. And therefore, in order to determine whether this wall is a party-wall, it is not necessary to consider

(1) 7 C. B. (N.S.) 99. (2) Law Rep. 8 Ch. 1084.
(3) 3 Q. B. D. 85.

what rights of ownership the Plaintiff and Defendant have, but what is the physical condition, position, and user of the wall.

Does this wall appear by the evidence to have been used as a separation of any building from any other building, with a view to the same (*i.e.*, the buildings) "being occupied by different persons?" I hold that the structure raised by the Defendant or his predecessor in title against the wall on the one side, and the closets placed by the Plaintiff against the wall on the other side, must be held to be buildings within the meaning of the Act. The Plaintiff's closets and the Defendant's structure were respectively used by the persons occupying the land on the two sides of the wall. Mr. *North* contended that because the Plaintiff had no "view that the buildings on each side should be occupied by different persons," therefore the wall was not a party-wall within the Act. But I think the words mean that the persons using the wall on each side have a "view to occupy" them differently. Mr. *North* also contended that the Act could not be intended to take away the control over the wall from the proper owner of it, but Acts of Parliament often take away some control of owners over their property for public purposes. Therefore I consider this wall to be a party-wall, but only so far as it is used by the Plaintiff on the one hand and the Defendant on the other as a support for their buildings. The case of *Weston* v. *Arnold* (1) shews that a wall may be a party-wall for some part of its height, and above that height may be the separate property of one of the adjoining owners. In the same way I hold this wall to be, laterally, a party-wall for such distance as it is used by both Plaintiff and Defendant for their buildings, and no further; the result is that for the distance that the Plaintiff's closets extend, the wall is a party-wall, and upon giving the proper notices under the Act, the Defendant may deal with that part of the wall in accordance with the 88th section of the Act.

As to the remainder of the wall, there must be an injunction, *simpliciter*, to restrain any interference by the Defendant. However small the extent of wall may be which is not a party-wall, it is important to the Plaintiff to have his rights over it protected, for, being a lessee, he is bound to deliver his holding up to his

(1) Law Rep. 8 Ch. 1084.

FRY, J. 1879 KNIGHT v. PURSELL.

landlord in the same condition as when it was leased to him, and I cannot hold, therefore, that any trespass even on a small part of the wall can be of too trivial a nature to be remedied in this Court.

Solicitors: *Withall & Compton; F. W. Mount.*

FRY, J. 1879 March 6, 19.

SANER *v.* BILTON.

[1876 S. 439.]

Costs—Apportionment of Costs—Claim dismissed—Counter-claim dismissed.

Where the Plaintiff's claim and Defendant's counter-claim are both dismissed with costs, the Plaintiff is to pay to the Defendant the general costs of the action, and the Defendant is to pay to the Plaintiff only the amount by which the costs have been increased by reason of the counter-claim.

IN this case (1) the Defendant put in a counter-claim, and the Court dismissed the action with costs to be paid by the Plaintiff to the Defendant, and dismissed the counter-claim with costs to be paid by the Defendant. The question thereupon arose whether all the proceedings which related to the Plaintiff's claim and the Defendant's counter-claim were to be apportioned, or whether the Defendant was to pay only so much of the Plaintiff's costs as were occasioned by the Defendant's counter-claim.

The Taxing Master held that there should be no apportionment.

Kekewich, Q.C., and *Hornell*, for the Plaintiff, referred to *Blake* v. *Appleyard* (2).

North, Q.C., and *Macnaghten*, for the Defendant:—

Where a cause and cross-cause were dismissed with costs, evidence taken in the former and used in both had to be paid for in the cause in which it was taken: *Corporation of Arundel* v. *Holmes* (3).

(1) Reported 7 Ch. D. 815. (2) 3 Ex. D. 195.
(3) 4 Beav. 325.

FRY, J., intimated that he should ask the assistance and advice of the Taxing Masters, and he accordingly obtained an opinion (1) from them, which he read after delivering his judgment.

(1) This opinion was signed by Mr. *Bloxam* and concurred in by Mr. *Shadwell*, Mr. *Skirrow*, and Mr. *Wainwright*, and was as follows:—

"As this practice is introduced by the *Judicature Act*, this is an entirely new question.

"It is a long-settled practice in Chancery that when a Plaintiff institutes a suit for two objects and succeeds upon one and fails on the other, the costs are apportioned thus:

"All the pleadings which apply exclusively to one object are considered costs relating to that, and the costs of so much of the pleadings as is common to both are apportioned between the two, and so are the general costs, such as a term fee: see *Heigham* v. *Grant* (1 Beav. 228).

"The mode of apportionment sanctioned in that case is complicated, and need not be considered. The objectant does not complain in this case of the mode of apportionment, but of any apportionment being made. I had lately to consider this question, and came to the conclusion that the above rule as to apportionment does not apply to this case. This is not a partial failure on the part of the Plaintiff, but entire failure, and consequently there is no settled practice upon the point. I however, after much consideration, considered that where the Plaintiff succeeds in all that he claims, he is, notwithstanding the Defendant succeeds on a counter-claim, entitled to his full costs, except in so far as they are occasioned or increased by the counter-claim, and so, if the Plaintiff's action is dismissed with costs, the Defendant is entitled to full costs against the Plaintiff, except such additional costs as are occasioned by the counter-claim.

"The Plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The Defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event.

"I consulted the Common Law Masters, who agreed in this view, but it is only a matter of opinion, there having been no decisions.

"The proceeding is analogous to the old practice of bill and cross-bill, but as these were distinct suits, and full costs allowed in both, there was no apportionment. There were three ways of taking the evidence:

"First, it might be taken in each suit.

"Secondly, the evidence might be taken in the one first at issue, and then an order obtained in the other to read it with such further evidence as might be necessary.

"Thirdly, the evidence might, by arrangement or order, be taken in both suits.

"In the two first cases the proceedings in each suit would be allowed as costs in the suit in which they were taken. In the third case only there would be an apportionment.

"The result is, that in my opinion, in the case under consideration, there ought not to be any apportionment, and the objection should be allowed, but being an undecided question, it is for the Court to settle the practice."

FRY, J.
1879
SANER
v.
BILTON.

March 19. FRY, J., after stating the facts and questions which arose, continued:—

In the first place, it appears to me that very little light is thrown upon this matter by the *Judicature Act* or the Orders. The only clause which bears upon it in any way is the 3rd rule of Order XIX, but this does not, it appears to me, throw any light upon the question of how costs are to be dealt with. The next question which arises is this: does the old practice throw any light, by way of analogy, upon the question which I have to determine? The analogy which has been presented to my attention is bill and cross-bill. With regard to that, there were three modes in which the evidence might be taken. In the first place, it might be taken in both the suits, and in that event the costs of the evidence so taken in each suit were, of course, dealt with without difficulty by the judgment in that suit. In the second place, the evidence might be taken in the one of the two suits which was first at issue, and an order obtained in the second or other suit to read it with such further evidence as might be necessary. Now, in that event, the costs of that evidence were costs in the action or suit in which it was taken, and the costs of the order were costs of the suit in which the order was made, and there was therefore in that case again no apportionment between the two suits. Thirdly, the evidence was sometimes taken by arrangement or order in both suits, and in that case, and in that case only, there was an apportionment in respect of the costs of the evidence which was common to the two suits. Now I am bound to say it does not appear to me that that former practice throws much light upon the present question, because the question is, to which of these proceedings is the present one most analogous? That can only be answered by considering the nature of the present proceeding. Therefore really I have to consider the question of expediency, so to speak, on general principles. It appears to me, upon the whole, that it is most convenient to conclude that the whole evidence, except so far as it is required for the purpose of the counter-claim, is to be deemed evidence in the original action, and, therefore, I think this case is most analogous to the second of the three modes of taking evidence under the old practice. The proper course will be this: the Plaintiff in the original action shall pay the general

costs of action, and the Defendant, who is to pay the costs of the counter-claim, shall only pay the costs of the proceedings so far as they have been increased by reason of that counter-claim. The principal reason which leads me to that conclusion is this, that the Plaintiff in the original action is the person who first commences litigation. The Plaintiff in the action first lets out the waters of litigation, and it is impossible to say how far the counter-claim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, the action should be treated as if it stood by itself, and the counter-claim should only bear the amount by which the costs of the proceedings are increased by it. I need not add that in every case the Court can give special directions which may vary the rule, but all I decide now is this, that in a case in which both action and counter-claim are dismissed with costs, the general costs of the proceedings are not to be apportioned, but the Defendant, who bears the costs of the counter-claim, has only to pay that sum by which the costs of the proceedings have been increased by the counter-claim. Determining the question in that way, no question with regard to the quantum arises.

Solicitors: *Gregory, Rowcliffes, & Rawle,* agents for *E. S. Wilson, Hull; A. R. Oldman,* agent for *Lowe, Moss, & Moss, Hull.*

WINGROVE *v.* THOMPSON.

[1877 W. 353.]

*Deceased Plaintiff—Appointment of Legal Personal Representative—Motion to Dismiss—*15 *&* 16 *Vict. c.* 86, *s.* 44.

A sole Plaintiff died insolvent, and, so far as could be ascertained, intestate.

On the application of the sole Defendant for an order appointing a person to represent the estate of the Plaintiff, that he (the Defendant) might have an opportunity to move for dismissal of the action in default of due prosecution thereof;

The Court made the order appointing a person to represent the deceased Plaintiff's estate.

THIS was an action for the administration of the personal estate of *E. W. Wingrove* by the trustee of the will, the Defendant

FRY. J.
1879
WINGROVE v. THOMPSON.

being a legatee. The Defendant put in a statement of defence and a counter-claim, charging the Plaintiff with wilful default.

On the 13th of November, 1878, the Defendant's solicitor was informed that the Plaintiff was dead.

The Defendant's solicitor thereupon made inquiry as to whether the Plaintiff left a will, and discovered that he had died insolvent, and that his solicitors did not intend to prosecute the suit. No grant of probate or letters of administration could be found.

Whitehorne applied on behalf of the Defendant *Thompson*, that a legal personal representative of the deceased Plaintiff might be appointed under sect. 44 of the *Chancery Procedure Act*, 15 & 16 Vict. c. 86, in order that the Defendant might move against him that the action might be dismissed unless revived. He said that he could find no case where such an application had been made in the case of a deceased Plaintiff, but he referred to *Chaffers* v. *Headlam* (1); *Davies* v. *Boulcott* (2); *Price* v. *Berrington* (3).

FRY, J.:—

The difficulty seems to be that, though the legal personal representative when appointed may be liable for the costs of the action, it does not follow that he can be made to carry on the action; but I think the section enables me to make the order; I say nothing about the motion to dismiss for want of prosecution, which may be made hereafter by a separate application.

Solicitor: *W. Stubbs.*

(1) 9 Hare, App. xlvi. (2) 1 Dr. & Sm. 23.
(3) 11 Beav. 90.

BIRMINGHAM CANAL COMPANY *v.* CARTWRIGHT.

FRY, J.

1879, March 21, April

[1877 B. 359.]

Perpetuity—Covenant to give unlimited Right of Pre-emption of Land—Railway Company—Power to purchase Mines—Express Purchase—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 77.

In a conveyance of a plot of land (reserving the mines under it to the vendor) there was a covenant by the vendor with the purchaser that, in case the vendor, his heirs or assigns, should at any time thereafter sell, or agree to sell, to any person the mines under some adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot of land, his heirs or assigns, the mines under that plot, and give him and them the refusal of the same for one month from the time such offer should be made, at the same price per acre as the vendor, his heirs or assigns, should have agreed to sell the adjoining mines. And, if the purchaser, his heirs or assigns, should accept such offer, and within such month agree to purchase the mines so offered, at the price at which they should be offered, the vendor, his heirs or assigns, should convey the same to the purchaser, his heirs or assigns :—

Held, that this covenant was not obnoxious to the rule against perpetuities. *Gilbertson* v. *Richards* (1) followed.

Held, also, that the performance of the covenant could be enforced by assigns of the purchaser against devisees of the vendor :

Held, also, that it was necessary that the offer should be made in writing, and that consequently the non-acceptance within a month of a parol offer made by the devisees of the vendor did not deprive the assigns of the purchaser of their rights under the covenant.

And specific performance of the covenant was decreed against the devisees of the vendor and a purchaser from them (with notice of the covenant) of the adjoining land and the mines under it, and also of the mines under the plot of land, to whom they had actually executed a conveyance.

The original special Act of a canal company empowered them to construct certain works, and provided that nothing in the Act contained should be construed to give the company the mines under any land purchased by them under the provisions of that Act, unless the same should be expressly purchased and paid for by the company under a special provision thereinafter contained, empowering the company to purchase the mines under their works, or within a certain distance from them, if the owner of the mines should give the company notice of his intention to work them, but with that exception all mines should be deemed to be excepted out of every purchase of land by the company. By a subsequent special Act the company were empowered to construct additional works, and to acquire additional lands for that purpose, and with this Act sect. 77 of the *Railways Clauses Consolida-*

(1) 4 H. & N. 277 ; 5 H. & N. 453.

FRY, J.

1879

BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

tion Act, 1845, was incorporated. The Act also provided that the works authorized by it should be considered as part of the undertaking of the company, and, subject to the provisions of the Act, should for all purposes be treated as if the same had been originally part thereof:—

Held, that the company had power, by virtue of sect. 77 of the *Railways Clauses Consolidation Act*, 1845, to make an express purchase of the mines lying under part of their works which they had constructed under the powers of their second special Act.

THIS action was brought for the specific performance of a covenant to give a right of pre-emption of some mines and minerals.

By an indenture dated the 3rd of September, 1856, *James Offley* granted to *J. S. Rutter* in fee a piece of land in the parish of *Cannock*, in the county of *Stafford*, except and always reserved unto *Offley*, his heirs and assigns, all and singular the mines and minerals lying under the piece of land, with liberty to work and get the same, subject nevertheless to the provisions for pre-emption by *Rutter*, his heirs and assigns, thereinafter contained. The deed contained a covenant by *Offley* for himself, his heirs, executors, administrators, and assigns, with *Rutter*, his heirs and assigns, "that in case he, the said *James Offley*, his heirs or assigns, shall at any time hereafter sell or agree to sell to any person or persons whomsoever the mines and minerals lying and being in and under the lands of the said *James Offley* adjoining to the said piece of land hereby conveyed, he the said *James Offley*, his heirs or assigns, shall and will at the same time offer to the said *J. S. Rutter*, his heirs or assigns, the mines and minerals lying and being in and under the said piece of land hereby conveyed, and give him and them the refusal of the same for the space of one calendar month from the time such offer shall be made, at the same price per acre as the said *James Offley*, his heirs or assigns, shall have agreed to sell his said adjoining mines and minerals. And if the said *J. S. Rutter*, his heirs or assigns, shall accept such offer, and within one such calendar month agree to purchase the said mines and minerals so offered to him or them at the price at which they shall be so offered, he the said *James Offley*, his heirs or assigns, shall at the expense in all things of the said *J. S. Rutter*, his heirs or assigns, convey and assure to the said *J. S. Rutter*, his heirs or assigns, the said mines and minerals under the piece of land hereby conveyed."

By an indenture dated the 27th of May, 1861, *Rutter* conveyed the piece of land comprised in the deed of the 3rd of September, 1856, to the Plaintiff company, together with the right of pre-emption of the mines and minerals reserved by that deed, to hold the same unto and to the use of the company, their successors and assigns, for ever, by virtue of and according to the true intent and meaning of the several Acts of Parliament, powers, or authorities enabling the company in that behalf. The company were authorized and empowered by Act of Parliament to purchase and hold lands for the purposes of their undertaking, and the land conveyed to them by the deed of the 27th of May, 1861, was required for those purposes. They constructed on the land, under the powers conferred on them by an Act passed in 1855, a part of their canal, called *Church Bridge Locks*. *Offley* died on the 16th of March, 1869, having by his will appointed his daughter, the Defendant *Jane Cartwright*, the wife of the Defendant *J. R. Cartwright*, and *Thomas Heatley* executors thereof, to whom he also devised all his lands and hereditaments at *Cannock*, including the mines and minerals under the piece of land comprised in the deed of the 3rd of September, 1856, upon trust for sale. On the 18th of April, 1877, the Defendants *Cartwright* and *Heatley* entered into an agreement in writing with the Defendant *Godson* for the sale to him of the lands adjoining the piece of land comprised in the deed of the 3rd of September, 1856, and the mines and minerals under those adjoining lands, and also the mines and minerals under the *Church Bridge Locks*. This agreement was made expressly subject to the powers of the company to purchase the mines under the locks. On the 9th of May, 1877, Mr. *Hawksford*, the solicitor of the Defendants *Cartwright* and *Heatley*, had an interview with Mr. *Thomas*, the clerk to the company, and told him that the representatives of *Offley* had agreed to sell to the Defendant *Godson* the mines and minerals under the lands adjoining the piece of land comprised in the deed of the 3rd of September, 1856, at a rate of about £155 per acre, and that he wished to know whether the company would purchase the mines and minerals under their piece of land at £150 per acre. No written offer was made to the company, but *Thomas* communicated what *Hawksford* had said to him to the directors of the company,

FRY, J.
1879
BIRMINGHAM CANAL COMPANY v. CARTWRIGT.

and on the 12th of June, 1877, the committee of the company resolved to purchase the mines and minerals, and *Thomas*, on their behalf, wrote to the solicitors of the Defendants *Cartwright* and *Heatley*, informing them that the company would purchase the mines at the price of £150 per acre. On the 13th of June the solicitors of the Defendants replied, "Not having received the canal company's answer to our offer of the mines at *Cannock* within a calendar month as mentioned in the deed of the 3rd of September, 1856, we finally settled and approved the draft conveyance of the property to Mr. *Godson*, and returned the same to his solicitors on Monday last. Under such circumstances we conceive the matter is now beyond our control."

On the 12th of July, 1877, the writ in this action was issued. On the 20th of July, 1877, the Defendants *Cartwright* and *Heatley* executed a conveyance to the Defendant *Godson* of the lands adjoining the piece of land comprised in the deed of the 3rd of September, 1856, and the mines and minerals under those lands, and also of the mines and minerals under the piece of land comprised in the deed of the 3rd of September, 1856. The conveyance was expressed to be "subject to the powers of the *Birmingham Canal Company* to purchase the mines under their canal and towing path." By their statement of claim the Plaintiffs asked that the Defendants might be decreed specifically to perform the covenant of *Offley* contained in the deed of the 3rd of September, 1856, to give to *Rutter*, his heirs or assigns, the right of pre-emption of the mines and minerals under the piece of land comprised in that deed.

The Defendants *Cartwright* and *Heatley* by their statement of defence said that their contract to sell the mines and minerals in question to *Godson* was entered into on the 18th of April, 1877, and was made expressly subject to the Plaintiffs' powers to purchase the same, and they insisted that the Plaintiffs had deprived themselves of their right to purchase by not accepting the offer made to them on the 9th of May, 1877, within the calendar month limited by the deed of the 3rd of September, 1856. They also said that they executed the conveyance to *Godson* before they had any notice of the action.

The Defendant *Godson*, by his statement of defence, said that

he entered into his contract to purchase the mines and minerals in question without any notice, express or implied, of the deed of the 3rd of September, 1856, or of any claim or right of the company thereunder. He also submitted that the company were not entitled to any right of pre-emption in respect of the mines and minerals in question; that, if they had any such right at the time when he contracted to purchase them, they had lost their right by not accepting the offer in time, and that at any rate he was not bound by the covenant in the deed of the 3rd of September, 1856.

The Plaintiff company were incorporated by an Act passed in 1835 (5 Will. 4. c. xxxiv.), which was entitled "An Act to consolidate and extend the powers and provisions of the several Acts relating to the *Birmingham* Canal Navigation." The Act dissolved a previously existing company and consolidated it and other companies into a new company, and empowered the consolidated company to purchase and hold lands, tenements, and hereditaments for the purposes or under the provisions of the Act.

Sect. 54 provided that "nothing in this Act contained shall extend or be construed to extend to give to the said company any mines of coal, ironstone, limestone, or fire clay below the thick coal, under any land already taken or purchased by the said hereby dissolved company or the said previous companies, or any of them, or to be taken or purchased by the said company under the provisions of this Act, unless the same have been already specifically and distinctly purchased and paid for by the said companies or any of them, or shall be expressly purchased and paid for by the said company under the special provision hereinafter contained; but all such mines of coal, ironstone, limestone, and fire clay below the thick coal shall (except in such cases as aforesaid) be deemed to be excepted out of every such purchase respectively."

Sect. 93 provided that no mines should be worked within twelve yards of the company's canals or works without the consent of the company.

Sect. 95 provided that "when and so often as any proprietor, lessee, or tenant of any mine of coal, ironstone, limestone, or other minerals lying under the said present or future canals, towing paths, reservoirs, or other works, or within the distance herein-

FRY, J.
1879
BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

before limited, shall be desirous of working the same (he being in respect of his estate or otherwise entitled to do so), then and in every such case such proprietor, lessee, or tenant shall give notice in writing under his hand of such intention to the clerk for the time being of the said company at least one calendar month before he shall begin to work such mine, and upon the receipt of such notice, it shall be lawful for the said company to contract or agree with any such proprietor, lessee, or tenant for the purchase of, and to purchase accordingly any such mine or part thereof, the getting or working of which may appear to the said company likely to prejudice the said canal, towing paths, reservoirs, or other works, and such proprietor, lessee, or tenant as aforesaid, is hereby empowered to sell and convey the same accordingly."

Sect. 252. "In all cases wherein it may be necessary for any person to serve any summons, demand, or notice, or any writ or other proceeding at law, in equity, or otherwise upon the said company, service thereof respectively on the clerk of the said company, or by leaving the same at the head office of the said company in *Birmingham* . . . shall be deemed good and sufficient service of the same respectively on the said company."

By an Act passed in 1840 (3 Vict. c. xxiv.), further powers were conferred on the company, and by sect. 53 of that Act sect. 54 of the Act of 1835 was explained as not being intended to give to the company the thick coal and the minerals above it, lying under the lands mentioned in that section, and it was enacted that that section should apply to all coal, ironstone, or limestone whatever under any land mentioned in it.

By another Act passed in 1855 (18 & 19 Vict. c. cxxi), the company were authorized to make and maintain additional canals and works.

By sect. 2 the *Lands Clauses Consolidation Act*, 1845, was incorporated with the Act.

Sect. 17. "The company may, in addition to the lands authorized to be compulsorily taken by them under the powers of this Act, contract with any owner willing to sell the same for the purchase of any lands adjoining or near to any of the canals by this Act authorized, not exceeding in the whole ten acres," for certain extraordinary purposes therein mentioned.

Sect. 18. "The clauses of the *Railways Clauses Consolidation*

Act, 1845, with respect to the temporary occupation of lands near the railway during the construction thereof, and also the clauses of that Act numbered 52, 53, 54, 55, 56, 57, and 58, relating to the substitution of other roads for roads interfered with, and the restoration of roads interfered with, and also the clauses thereof with respect to mines under or near the railway, and also clause 27 of the *Waterworks Clauses Act*, 1847, shall be incorporated with this Act, and shall extend and be applicable to the canals and works by this Act authorized; and in construing those clauses in connection with this Act, the expression 'the railway,' and 'the waterworks,' shall mean the canals and works by this Act authorized."

Sect. 21. "The owner of any mines, minerals, lands, or works, or the company at his request, may from time to time, with such consent as hereinafter mentioned, make and maintain any branch canal or tramway, with all necessary wharfs, works, and conveniences, from such mines, minerals, lands, and works, to communicate with any of the canals or tramways of the company now existing or authorized or hereafter to be made . . . provided always, that no such branch canal or tramway, works, or conveniences, shall be made in or through any lands without the consent of the owner and occupier thereof . . . and the lands in or through which any such branch canal or tramway, works, or conveniences, are intended to be made shall, for the purposes of this enactment, be deemed lands by this Act authorized to be purchased by agreement for the purposes of this Act."

Sect. 27. "Every branch canal or tramway, work or convenience, purchased or made by the company shall be vested in the company as part of the undertaking of the company to all intents and purposes."

Sect. 31. "The canals and works by this Act authorized shall be considered as part of the undertaking of the company, and, subject to the provisions of this Act, shall for all purposes be treated and dealt with as if the same had originally been part thereof."

The *Church Bridge Locks* were constructed by the company under the powers conferred by sect. 21 of the Act of 1855.

This was the trial of the action.

FRY, J.

1879

BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

North, Q.C., and *Speed*, for the Plaintiffs:—

The offer to purchase, as it relates to land, must be made in writing, otherwise there would be no contract which the Court could recognise. The omission, therefore, to accept the parol offer within a month has not deprived the Plaintiffs of their right under the covenant. *Godson* cannot sustain the defence that he is a purchaser for value without notice, for his contract was made expressly subject to the rights of the Plaintiffs, and the action was commenced before the conveyance to him was executed The deed of the 3rd of September, 1856, was stated in the abstract of title furnished to him.

[FRY, J.:—May not a question arise whether the covenant is obnoxious to the rule against perpetuities?]

The covenant does not prevent the parties from dealing with the property. Restrictive covenants as to the use of land have been enforced in a great many cases such as *Western* v. *Macdermott* (1), and it has never been suggested that they violate the rule against perpetuities. Even if a parol offer would have been sufficient under the covenant, a verbal offer made to *Thomas* could not bind the company. Sect. 252 of the Act of 1835 shews the company could only be bound by a written communication. It is clear that the company have statutory power to purchase mines. Sect. 54 of the Act of 1835 does not control the powers given by the Act of 1855, under which the *Church Bridge Locks* were constructed, and sect. 77 of the *Railways Clauses Act*, 1845, which is incorporated with the Act of 1855 gives power to purchase the mines if they are expressly purchased. At any rate, it does not lie in the mouth of those who have contracted to sell the mines to the company to say that the company have no power to purchase them. Any corporation has power to purchase land, though they may not be able to hold it afterwards. They stand in this respect in a similar position to an alien: *Coke* upon *Littleton* (2).

Kekewich, Q.C., and *Hornell*, for *Offley's* devisees:—

The company have no power to purchase these mines. Sect. 51

(1) Law Rep. 1 Eq. 499; Ibid. 2 Ch. 72. (2) 2 b.

35 Beav. 143.

of the Act of 1835 shews that. And sect. 77 of the *Railways Clauses Consolidation Act* does not give the power; the words "expressly purchased" in it must mean expressly purchased under the powers of the company's special Act. The Act of 1835 forbids the company to purchase mines for the purposes of their original undertaking, and the Act of 1855 does not expressly give the power for the purposes of the additional works thereby authorized. Moreover, this would not be a purchase of the surface of the land with the mines under it, but a purchase of the mines separately. Such a case is not within the purview of sect. 77. There is nothing to shew that the company require these mines for the purposes of their Act.

But, if the company have power to purchase, we have performed the covenant by making the verbal offer to them, and they have lost their right by not accepting the offer in time. By virtue of the covenant an offer and its acceptance constitute a contract to purchase, and there is no reason why the offer should be in writing. The Plaintiffs do not allege in their pleading that no offer was made to them.

Cookson, Q.C., and *Whitehorne*, for *Godson*:—

We rely on sect. 54 of the Act of 1835 as shewing that the company have no power to purchase the mines, and sect. 31 of the Act of 1855 shews that the works authorized by the Act are to be treated as part of the original undertaking of the company. The statutory powers of a company must be construed very strictly: *Stourbridge Canal Company* v. *Wheeley* (1); *Scales* v. *Pickering* (2). The relief claimed by the Plaintiffs is inconsistent with the allegations of their statement of claim, which shew that an offer has been already made, and the covenant is exhausted.

[FRY, J.:—I should give leave to amend if necessary, for the facts stated might lead to alternative relief.]

A verbal offer is sufficient within the covenant: *Dickinson* v. *Dodds* (3).

But another objection is that the covenant itself is a violation

(1) 2 B. & Ad. 792. (2) 4 Bing. 448.
(3) 2 Ch. D. 463.

FRY, J.
1879
BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

of the rule against perpetuities; it tends to prevent the alienation of the mines for all time: *Lewis* on Perpetuity (1); *Sugden* on Powers (2); *Ware* v. *Polhill* (3).

[FRY, J., referred to *Ferrand* v. *Wilson* (4).]

Stocker v. *Dean* (5); *Highgate Archway Company* v. *Jeakes* (6); *Attorney-General* v. *Cordwainers' Company* (7); *Roe* v. *Galliers* (8). *Gilbertson* v. *Richards* (9) may be relied on as an authority to the contrary, but it is inconsistent with other cases, and the judgment was not mainly founded on this point.

How can such a covenant as this bind assigns, or how can assigns have the benefit of it?

It is an entirely collateral covenant; it relates to a different inheritance from that which was conveyed, and therefore it falls within the exception in *Spencer's Case* (10). In such cases as *Western* v. *Macdermott* (11) and *Luker* v. *Dennis* (12), both parties were interested in the same subject-matter. The right of pre-emption may last for ever; it might give rise to a right as between complete strangers. The covenant is repugnant to the very notion of an estate in fee simple.

[FRY, J:—May not the exercise of the right be good if it takes place within the lifetime of the covenantor and twenty-one years afterwards? just as in the case of unlimited powers: *Sugden* on Powers (13).]

In such cases it was possible to divide the power, as in *Lantsbery* v. *Collier* (14). No doubt in *Keppell* v. *Bailey* (15) Lord *Brougham* relied on the fact that a restrictive covenant which ran with the land could be released. But this covenant does not run with the land. At any rate, the performance of the covenant cannot be enforced against *Godson*, the purchaser; he is not selling the adjoining property.

(1) Page 479 *et seq.*
(2) 8th Ed. p. 849.
(3) 11 Ves. 257.
(4) 4 Hare, 344.
(5) 16 Beav. 161.
(6) Law Rep. 12 Eq. 9.
(7) 3 My. & K. 534.
(8) 2 T. R. 133.
(9) 4 H. & N. 277; 5 H. & N. 453.
(10) 5 Rep. 16 a.
(11) Law Rep. 1 Eq. 499; Ibid. 2 Ch. 72.
(12) 7 Ch. D. 227.
(13) 8th Ed. p. 848 *et seq.*
(14) 2 K. & J. 709.
(15) 2 My. & K. 517, 527.

Speed, in reply:—

The judgment of the Court of Exchequer in *Gilbertson* v. *Richards* (1) disposes of the objection as to perpetuity. In *Stocker* v. *Dean* (2) the decision was, that, on the construction of the covenant, the exercise of the right of pre-emption was intended to be limited to the lifetime of the covenantor, and that was the *ratio decidendi*. *Highgate Archway Company* v. *Jeakes* (3) turned upon the construction of an Act of Parliament. *Lantsbery* v. *Collier* (4) has no bearing on the point. *Tulk* v. *Moxhay* (5), *Luker* v. *Dennis* (6), and cases of that class apply, and in none of them was this objection suggested. *De Mattos* v. *Gibson* (7) shews that the Court will enforce a contract of this nature.

FRY, J., after stating the facts, continued:—

The question has been raised whether the company have any power to buy these mines at all; and the first point which arises on the Act of 1855 is whether it has been proved that the *Church Bridge Locks* were constructed under the power given by sect. 21? The evidence satisfies me that they were. The next question is, whether the company had power to acquire the mines and minerals under the *Church Bridge Locks* by express contract. It appears to me that they had, because it is provided that any land, through which the branch canal or works, which may be made under the 21st section, shall pass, shall, for the purpose of the enactment, be deemed to be land by the Act of 1855 authorized to be purchased by agreement for the purpose of that Act. In other words, lands taken under the 21st section are to come into the same category as lands taken under the 17th section, and are to be deemed to be taken for the purpose of the 17th section. But, where lands are taken under the 17th section, the provisions of the *Railways Clauses Consolidation Act* with regard to the mines and minerals apply. The material section of that Act, the 77th, provides that the company shall not be entitled to any mines under any land purchased by them (except such part as shall be necessary to be dug and

(1) 5 H. & N. 453.
(2) 16 Beav. 161.
(3) Law Rep. 12 Eq. 9.
(4) 2 K. & J. 709.
(5) 2 Ph. 774.
(6) 7 Ch. D. 227.
(7) 4 De G. & J. 276, 282.

FRY, J.
1879
BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

carried away or used in the construction of the works) unless the same shall have been expressly purchased; "and all such mines (excepting as aforesaid) shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." That appears to me to be a very plain and clear provision. You may buy the mines, but you must buy them expressly, and they must be expressly conveyed to you. If they are expressly conveyed to you, you get them; if they are not, the deed does not operate upon them. Nor do I think that the effect of that section can be cut down by the subsequent sect. 78 of the Act, which gives a particular power to the railway company to buy the mines in the event of the owner giving notice of his intention to work them under or within a certain distance of the railway. I think, therefore, that according to the true construction of the Act of 1855, the company have power expressly to buy mines. But then it is said, that, however that may be, taking the Act of 1855 alone, it is not so when regard is had to the previous Acts which regulate the constitution of this company, especially the Act of 1835. [His Lordship referred to sect. 54 of the Act of 1835 and sect. 53 of the Act of 1840.] But sect. 54 only provides that nothing in that Act contained shall give the mines, and it only precludes the mines from passing, except in the manner pointed out in that Act, in respect of lands taken under the provisions of that Act. It does not lay down a general rule for the operations of the company or a general immutable principle of the constitution of the company; it only provides what is to happen in respect of the lands taken under the provisions of that Act. The lands taken under the Act of 1855 appear to me not to be in any way affected by the provisions of the Act of 1835. I come, therefore, to the conclusion that the company have the power expressly to purchase mines.

20 Ch. D. 592

The next question arises upon the terms of the covenant giving the right of pre-emption—whether or not that right is obnoxious to the rule against perpetuities. [His Lordship stated the effect of the covenant.] In my opinion the covenant is not in any way liable to that objection. I think that wherever a right or interest is presently vested in *A.* and his heirs, although the

right may not arise until the happening of some contingency which may not take effect within the period defined by the rule against perpetuities, such right or interest is not obnoxious to that rule, and for this reason. The rule is aimed at preventing the suspension of the power of dealing with property—the alienation of land or other property. But, when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and they can together at any time alienate the land absolutely. I think that *Gilbertson* v. *Richards* (1) is a distinct authority in favour of that conclusion. There a rent was to arise at any time thereafter when the mortgagees should enter into possession, and the Court of Exchequer said that was not in any way a violation of the rule against perpetuities. "It is quite true," they said (2), "that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity, in an illegal sense. It is vested in *Thomas Billings* and his heirs. He or his heirs may sell it, or release it, at their pleasure. A rent in fee simple may be granted to a man and heirs to continue for ever. Why, therefore, may not one be granted to commence at any time, however remote? It is only a part of the estate in fee simple of the rent." And though the Court of Exchequer Chamber did not deliver their judgment mainly upon that question, they nevertheless referred to it in a manner which sufficiently indicated their opinion upon the point. "There may," they said (3), "be considerable doubt also on the point raised by counsel, whether the rule as to perpetuities applies to a case like the present, where the party, who or whose heirs are to take, is ascertained, and who can dispose of, release, or alienate the estate, either at Common Law, or at all events since the passing of the Act 8 & 9 Vict. c. 106, s. 6."

(1) 4 H. & N. 277. (2) 4 H. & N. 297.
(3) 5 H. & N. 459.

FRY, J.
1879
BIRMINGHAM CANAL COMPANY v. CARTWRIGHT.

The next question I have to determine is this. It is said that the Plaintiffs come too late, that a valid offer was made to them on the 9th of May, and that, it not having been accepted until the 12th of June, the calendar month within which the acceptance of the offer must be made had expired. It is therefore very material to consider what the nature of the offer and acceptance was to be. [His Lordship referred to the covenant]. Upon the whole I think that, according to the true construction of the covenant, the offer ought to have been made in writing, and, for this reason, that the covenant appears to me to be a contract that a contract shall be made, and that the contract so to be made shall be one capable of being enforced. I think that is the good sense of the thing, having regard to the general scope and object of the covenant, and I find there are particular words which strengthen the conclusion derived from the general scope and object of the covenant. It is stipulated that *Rutter* shall, by accepting the offer, enter into an agreement. I think that must be an agreement capable of being enforced against him, and it could only be enforced against him if it was in writing. That, I think, indicates that it was intended that *Rutter* should sign a written acceptance, and, if he was to accept in writing, it seems to me to be reasonable to require that the offer to be made to him should also be in writing, and if so, the offer to the company ought to have been made in writing.

But, even if I am wrong in that conclusion, I hold that the offer never was made in such a manner as that *Offley's* representatives can say that at the expiration of one month the right of the company had gone. Before the month could begin, even if the offer could be made by parol, it must be an unconditional, unqualified, and perfectly plain offer, and it is clear from the evidence it was not. If I am wrong in that conclusion it would be material to consider the further question, whether the offer, made as it was to *Thomas*, was an offer made to the company. It is evident that he had no express authority to receive the offer, and I have great difficulty in seeing that, as a mere clerk of the company, he had any implied authority to receive it. If the offer had been addressed to the clerk of the company at the office of the company, that would have been another thing, but to say that he had authority to receive the offer made as it was, so that from

the date of his reception of it, and not from the date of his communication of it to the managing body of the company, the time began to run, seems to me a proposition very difficult to establish.

I think that no offer has been made in accordance with the covenant, and consequently the company are now entitled to the benefit of the covenant.

The case has been put by the Plaintiffs on the ground of the covenant, and not on the ground of there having been a contract under the covenant, and I think it has been rightly put in that manner. The result is that there is nothing binding the company or the devisees of *Offley* to the £150 per acre mentioned by *Hawksford* to *Thomas*.

I am of opinion that the company are entitled to the benefit of the covenant, and to purchase the mines under the land comprised in the deed of the 3rd of September, 1856, at the same price per acre as that at which the mines under the adjoining land have been sold by the devisees to *Godson*. There must be an inquiry what that price was, and on payment of that price the Defendants must convey the mines in question to the company. The Defendants must pay the costs of the action.

A day or two after giving this judgment,

FRY, J., stated that it had occurred to him that it might be arguable whether the covenant applied at all to a case where the representatives of *Offley* were selling, not merely the mines under the adjoining land, but the adjoining lands together with the mines under them. His Lordship said that he would give the Defendants' counsel an opportunity of arguing this point if they desired it.

The Defendants' counsel, however, after taking time to consider it, declined to argue the point.

Solicitors for Plaintiffs: *Tucker & Lake*, agents for *Wragge, Evans, & Holliday, Birmingham.*

Solicitors for Devisees: *Saunders, Hawksford, & Bennett*, agents for *Hawksford & Owen, Wolverhampton.*

Solicitors for Defendant *Godson*: *Wilkins, Blyth, & Fanshawe*, agents for *Arthur Wright, Oldbury.*

FRY, J.
1879
March 29.

WYMER *v.* DODDS.

[1876 W. 132.]

Practice—General Liberty to amend—Striking out Name of Defendant not specified—Defendant whose Interest has ceased—Revivor—Costs—Rules of Court, 1875, *Order* XVI., *rr.* 13, 14.

10 QBD 116

Under an order to strike out the name of one Defendant and giving general liberty to amend, the Plaintiff is not justified in striking out the name of another Defendant.

A Defendant whose interest has ceased pending the suit cannot obtain payment of his costs.

THIS action was commenced on the 13th of April, 1876.

The statement of claim asked that *Thomas Vaughan* and *Joseph Dodds* might be ordered forthwith to pay into Court a sum of £10,000 (being the fourth part of a certain legacy of £40,000), and that the same might be duly invested and secured for the benefit of the Plaintiffs and all the other persons interested therein, and that the trusts of the one-fourth part might be administered under the direction of the Court and new trustees appointed in place of *Vaughan* and *Dodds*. *T. L. Elwon*, one of the Defendants, had an interest in the income of the whole of the £40,000 until he should assign, charge, or otherwise dispose of the income or any part thereof by way of anticipation, or should do or suffer some act or thing whereby the same would, but for that provision, become vested in some other person or persons.

In September, 1876, *Elwon* filed a liquidation petition, under which a trustee of his property was appointed. On the 20th of November, 1876, upon the application of the Plaintiffs, by a summons dated the 11th of July, 1876, an order was made that, upon the payment of the costs of the application, the writ and the statement of claim should be amended by substituting *Mary L. A. Wymer*, a Defendant, as Plaintiff in the place of the original Plaintiffs, and by striking out her name as Defendant, and otherwise as the Plaintiffs might be advised. *Elwon* was served with notice of this application. Nothing was said about striking his name out as a Defendant. His costs of the application were afterwards taxed and paid. After this order was made *Elwon's*

solicitor received no notice of any further proceeding in the action, and in January, 1877, he discovered that on the 2nd of December, 1876, the Plaintiffs' solicitors had amended the writ and statement of claim by substituting the new Plaintiff as mentioned in the order, and that they had also at the same time struck out the name of *Elwon* as a Defendant. This had been done without any notice to *Elwon*, and without making any provision for his costs of the action. *Elwon* then claimed his costs of the action, and ultimately, on the 4th of July 1878, took out a summons in the Chambers of Vice-Chancellor *Malins*, asking that his costs of the action might be paid out of a fund in Court, or by the next friend of the Plaintiff. The hearing of the summons was adjourned into Court, and in consequence of the illness of the Vice-Chancellor the action was transferred to Mr. Justice *Fry*.

Higgins, Q.C., and *Creed*, for the summons:—

The general liberty to amend given by the order of the 20th of November, 1876, did not justify the striking out of *Elwon's* name. The name of a Defendant cannot be struck out without a special order for the purpose: Rules of Court, 1875, Order XVI., rules 13, 14. The Defendant is entitled to his costs: *Blackmore* v. *Smith* (1); *Daniell's* Chancery Practice (2).

Glasse, Q.C., and *Romer*, for the Plaintiff:—

The Defendant's interest ceased on the filing of his petition.

[FRY, J.:—But had you a right to dismiss him without providing for his costs?]

Admitting that the general liberty to amend did not authorize the striking out the Defendant's name, still he is not entitled to his costs. Under the old practice if any interest had survived to the trustee in the liquidation the suit must have been revived against him, or the bill must have been dismissed with costs: *Blackmore* v. *Smith*; *Daniell's* Chancery Practice. But, as no interest survived to the trustee, the debtor, even if his name had not been struck out, must have been treated as no longer a party to the suit: *Robertson* v. *Southgate* (3). There could

(1) 1 Mac. & G. 80. (2) 5th Ed. 711.
(3) 5 Hare, 223.

FRY, J. 1879 WYMER v. DODDS.

be no revivor for costs which had not been taxed. The old practice in this respect remains unaltered.

Higgins, in reply:—

The fact that the Plaintiffs did that which the order did not authorize them to do entitles the Defendant to his costs.

FRY, J., after stating the nature of the summons of the 11th of July 1876, and the effect of the order of the 20th of November 1876, continued:—

The Plaintiffs amended the writ and statement of claim, not only by making the alteration which was specifically indicated in the order, but also by striking out the name of the Defendant *Elwon*. It appears to me that the order did not justify this proceeding. I think it is clear that when an application is made for leave to alter a writ and statement of claim by striking out the names of some of the parties, the order giving that leave cannot justify the striking out of the name of some other party without providing for his costs of the action. So to hold would be to construe the order with a laxity of which its terms do not admit. If the matter stood there I should think that the present applicant was right in saying that the Plaintiff has proceeded in a wrong way. But it does not follow that in the present case I can order the Plaintiffs to pay all the Defendant *Elwon's* costs of the action. The filing of his liquidation petition operated as a voluntary alienation, and put an end to his estate in the trust fund. If the action had been brought for the adjustment of the income of the fund during his estate, he would have had a continuing interest notwithstanding the liquidation proceedings. But the action was brought only to secure the capital of the fund, and did not deal with the income at all, and therefore the Defendant *Elwon's* interest entirely ceased in September, 1876. It is not necessary that I should determine what was the proper course for the Plaintiffs to take. They would have been right in taking either of these two courses—in obtaining an order to strike out *Elwon's* name as a Defendant, or in retaining him and not serving him with any further proceedings in the action. But, his interest having ceased, no one could be entitled to receive his costs unless

some order of revivor was made, and no such order could be made, as his right to costs was only an inchoate and contingent right. If the Plaintiff had followed the proper course *Elwon* could not have got any costs of the action. I cannot make the Plaintiff pay costs merely because a wrong course was taken. I must, therefore, refuse the summons, but without costs.

FRY, J. 1879 WYMER v. DODDS.

Solicitor for Defendant *Elwon*: *Oliver Richards.*
Solicitors for Plaintiffs: *Walker, Martineau, & Co.*

ANSTEY *v.* NORTH AND SOUTH WOOLWICH SUBWAY COMPANY.

FRY, J. 1879 *April* 5.

[1878 A. 20.]

Practice—Interrogatories—Summons for further Answer—Particulars—Rules of Court, 1875, *Order* XXXI., *r.* 10.

A summons for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required.

Chesterfield Colliery Company v. *Black* (1) followed.

THE Defendants delivered interrogatories for the examination of the Plaintiff. The Plaintiff made an affidavit in answer, and the Defendants then took out a summons, asking that the Plaintiff might be ordered to make and file a further affidavit in answer to the interrogatories. The hearing of the summons was adjourned into Court.

Glasse, Q.C., and *Loughborough*, for the Defendants.

Higgins, Q.C., and *Mulligan*, for the Plaintiff:—

The summons ought to have specified the particular interrogatories to which a further answer is required. In *Chesterfield Colliery Company* v. *Black* (1), Vice-Chancellor *Hall* held that this ought to be done; and in *Allhusen* v. *Labouchere* (2), which was a summons to strike out interrogatories, the Court of Appeal held that the interrogatories objected to ought to be pointed out.

(1) 24 W. R. 783. (2) 3 Q. B. D. 654.

FRY, J.
1879
ANSTEY v. NORTH AND SOUTH WOOLWICH SUBWAY COMPANY.

FRY, J. :—

I had better follow the precedent of *Chesterfield Colliery Company* v. *Black*. You must tell your opponent what you object to; to what interrogatories or parts of interrogatories you require further answers. You must deliver to him a statement in writing, and then the hearing of the summons can be resumed in Court without the expense of taking out a new summons in Chambers.

Solicitor for Defendants: *P. Burdett Cunningham.*
Solicitors for Plaintiff: *W. & J. Gibson.*

FRY, J.
1879
April 5.

PENNY *v.* PENNY.

[1868 P. 20.]

Administration Suit—Costs—Direction by Testator that "Testamentary Expenses" shall be paid out of a particular Fund.

A testator directed by his will that his "testamentary expenses" should be paid out of a specified part of his estate:—

Held, that the costs of a suit to administer the estate were included under "testamentary expenses."

THIS suit was commenced in the Court of Chancery for the administration of the estate of *C. W. Penny*. By his will the testator directed all his debts, funeral and testamentary expenses, to be paid out of his money invested in the *City of London Brewery Company;* and he gave, devised, and bequeathed three houses at *Dalston*, and all his money invested in the *City of London Brewery Company*, and all other his real and personal estate, to his wife *Maria Penny*, upon trust to receive the income thereof for the support of herself and his two children *Edward* and *Emma*, until they should respectively attain twenty-one; and upon the son attaining twenty-one the testator gave the three houses to him absolutely; and upon the daughter attaining twenty-one he directed that the money invested in the *City of London Brewery Company*, and all other his residuary estate, should be equally divided between his daughter, his wife, and his son. And he appointed his wife sole executrix of his will. The Plaintiffs were

the two children (then infants) by a next friend, the Defendant being the executrix. The infants having attained twenty-one, a summons was taken out for the division of the funds. The question now argued was whether the costs of the suit were included among the "testamentary expenses" which were to be paid out of the money invested in the brewery company.

Woodroffe, for the Plaintiff:—

The costs of an administration suit are "testamentary expenses": *Miles* v. *Harrison* (1); *Harloe* v. *Harloe* (2).

[FRY, J., referred to *Allan* v. *Gott* (3).]

Everitt, for the Defendant:—

The cases cited are distinguishable; they depended on special circumstances.

FRY, J.:—

In my judgment the costs of the suit must be paid out of the money invested in the brewery company. I think that *Miles* v. *Harrison* shews that when a testator directs that a particular fund is to be charged with the payment of his testamentary expenses, that fund must bear the costs of an administration suit.

Solicitor for Plaintiff: *E. Kimber.*
Solicitor for Defendant: *Carter.*

(1) Law Rep. 9 Ch. 316, 323. (2) Law Rep. 20 Eq. 471.
(3) Law Rep. 7 Ch. 439.

FRY, J.
1879
April 8, 28.

In re BARBER.
DARDIER *v.* CHAPMAN.

[1877. B. 10.]

Husband and Wife—Wife's Chose in Action—Reduction into Possession—Receipt by Agent of Husband and Wife.

The receipt by an agent, appointed by husband and wife, of money forming part of the estate of an intestate of which the wife is administratrix, amounts to a reduction into possession by the husband of the wife's distributive share of the money.

Huntley v. *Griffith* (1) followed.

THIS was an action brought by a creditor for the administration of the estate of *William Barber*, who died on the 3rd of November, 1876, having appointed his wife *Mary Ann Barber*, *W. H. Chapman*, and *Sanderson Corpe*, his executors, and having devised and bequeathed the residue of his real and personal estate to his wife. The Defendants were *Chapman* and *S. Corpe*. An administration decree having been made, the Plaintiff sought to surcharge the Defendant *S. Corpe* beyond the amount which he admitted by his account to be due from him to the estate of the testator. The claim to surcharge arose under the following circumstances.

Mrs. *Barber* was formerly the wife of *J. S. Corpe*. He died intestate on the 21st of January, 1857, and administration to his estate was granted to her. The intestate left the Defendant *Sanderson Corpe* and four other children surviving him. One of these children afterwards died. The widow was originally entitled to 25-75ths of the estate of the intestate, and each of the five children to 10-75ths. On the death of the child who died the widow became entitled to an additional 2-75ths of the estate, making her share altogether 27-75ths. In 1865 the widow married *W. Barber*. No settlement was made on the marriage. The estate of the intestate was managed for the administratrix at first partly by *George Corpe*, a brother of the intestate, and partly by the Defendant *S. Corpe*, and after the death of *George Corpe* in 1868 the management was continued by the Defendant *S. Corpe*

(1) F. Moore, 452; Goldsborough, 159.

alone. He received various sums of money which a former partner of the intestate owed to his estate. Out of the moneys thus received the Defendant *S. Corpe* paid various debts of the intestate, and there then remained in his hands a balance of £163 15*s.* 2*d.*, which he invested in consols in his own name. On the 1st of November, 1876, he sold the consols, and applied the proceeds of the sale to his own use. In July, 1877, he replaced the stock. The Plaintiff sought to surcharge the Defendant *S. Corpe* with 27-75ths of the sum of £163 15*s.* 2*d.*, on the ground that the receipt of it by him amounted to a reduction into possession by *W. Barber* of his wife's beneficial interest in the £163 15*s.* 2*d.*, and that consequently 27-75ths of the £163 15*s.* 2*d.* formed part of his estate.

In the opinion of the Court the evidence proved that the Defendant *S. Corpe* was authorized by *Barber* and his wife to receive the money.

Cookson, Q.C., and *T. A. Roberts*, for the Plaintiff:—

The fund was reduced into possession by *W. Barber* in his lifetime, inasmuch as the Defendant *S. Corpe* was acting as his agent.

[FRY, J.:—The question is whether the husband ever had any control over the *chose* without bringing an action. The fund was not in his actual possession.]

Physical or manual possession is not necessary. If money is placed at a bank to the account of the wife alone, the husband can sue for it: *Lloyd* v. *Pughe* (1). The possession of an agent is sufficient: *Hansen* v. *Miller* (2); *Williams* on Executors (3), and the cases there cited; though the joint control of husband and wife does not amount to reduction into possession: *Nicholson* v. *Drury Buildings Estate Company* (4).

[FRY, J.:—The money was a debt due from the agent.]

That must always be so when it is paid to the husband's agent. The present case is not like *Baker* v. *Hall* (5), where it was held that a husband who was in possession only as executor and trustee

(1) Law Rep. 8 Ch. 88.
(2) 14 Sim. 22.
(3) 7th Ed. vol. i. p. 873.
(4) 7 Ch. D. 48.
(5) 12 Ves. 497.

FRY, J.
1879
In re BARBER.
DARDIER *v.* CHAPMAN.

did not thereby reduce his wife's share of the residue into possession. Lord Justice *Mellish*, in his judgment in *Lloyd* v. *Pughe* (1), says that a wife cannot lend money; so this money, if lent to the Defendant *Corpe*, must have been lent by the husband. If an action had been brought for it, it could not have been alleged that *Corpe* was indebted to the wife as administratrix without also alleging that he was indebted to the intestate, which he was not. He could not be indebted to the administratrix personally. It could not be said that the money was an outstanding asset of the intestate.

[FRY, J., referred to *Cooper* v. *Cooper* (2), as shewing the nature of the interest of the next of kin of an intestate in his personal estate.]

J. Mander, for the Defendant *Chapman*.

Higgins, Q.C., and *Bromehead*, for the Defendant *S. Corpe*:—

There has been no reduction into possession. *S. Corpe* was not the agent of the husband. He had acted for his mother before her second marriage. In order to recover the fund, the husband and wife must have sued together: *Fleet* v. *Perrins* (3).

[FRY, J.:—I believe that when the wife's right accrues before the coverture the husband and wife must sue together; but when the right accrues during the coverture, the husband can sue alone: *Milner* v. *Milnes* (4).]

Here the husband asserted no right during the coverture; he allowed his wife and her son to manage the estate. The acts relied on as a reduction into possession must be such as to divest the right of the wife, and make that of the husband absolute: *Bond* v. *Simmons* (5); *Roper's* Husband and Wife (6); *Blount* v. *Bestland* (7); *Nash* v. *Nash* (8); *Prole* v. *Soady* (9); *Scrutton* v. *Pattillo* (10); *In re Eykyn's Trusts* (11); *Aitchison* v. *Dixon* (12).

(1) Law Rep. 8 Ch. 90.
(2) Ibid. 7 H. L. 53, 65.
(3) Ibid. 4 Q. B. 500.
(4) 3 T. R. 627.
(5) 3 Atk. 20.
(6) 2nd. Ed. vol. i. p. 208, *et seq.*
(7) 5 Ves. 515.
(8) 2 Madd. 133.
(9) Law Rep. 3 Ch. 220.
(10) Ibid. 19 Eq. 369.
(11) 6 Ch. D. 115.
(12) Law Rep. 10 Eq. 589.

Cookson, in reply:—

The law is that if a debt accrues to a wife before marriage, the husband must join with her in suing for it; if it accrues after marriage, the husband can sue alone: *Roper's* Husband and Wife (1).

[FRY, J.:—The wife also can sue alone: *Bendix* v. *Wakeman* (2).]

In *Fleet* v. *Perrins* (3), Baron *Cleasby* said (4): "If the money had been paid into a bank used by the husband and wife, or if the Defendant had been the wife's agent to receive the money, so that the receipt by her would have been the receipt of the wife, that would have been quite a different matter, the money would then have been money received by the wife, and, consequently, absolutely the husband's." *Nash* v. *Nash* (5) was the case of a promissory note given to a wife, and is therefore distinguishable from the present case. Here the possession of the agent was in fact the absolute dominion of the husband.

FRY, J., after stating the facts, continued:—

The inference I draw from the evidence is that from 1865 to 1868 the estate of the intestate was managed partly by *Sanderson Corpe*, and partly by *George Corpe*. *George Corpe* died in 1868, and after his death the management of the estate was continued by *Sanderson Corpe* alone. I draw this further inference, that the management of the estate and the receipt of the money took place by the authority of *Barber* and his wife. *Sanderson Corpe* received various sums of money from the partner of the intestate, and by means of them paid various debts of the intestate, and there remained in his hands a balance of £163 15*s.* 2*d.* That sum he, in December, 1875, invested, together with other money in his hands belonging to another estate, in his own name in consols. On the 1st of November, 1876, he sold out the consols and appropriated the proceeds. The question is whether the estate of *William Barber* is entitled to 27-75ths of

(1) 2nd Ed. vol. i. p. 212.
(2) 12 M. & W. 97.
(3) Law Rep. 4 Q. B. 500.
(4) Ibid. 508.
(5) 2 Madd. 133.

FRY, J.
1879
In re BARBER.
DARDIER *v.* CHAPMAN.

the £163 15*s.* 2*d.*, and that turns upon this question, was the receipt of the money by *Sanderson Corpe* a reduction into possession by *William Barber* of 27-75ths of it? It appears to me that this question is answered by a very old authority, I mean the case of *Huntley* v. *Griffith* (1), which is thus stated:—

"*Le case fuit que un legacy fuit devise al un feme sole que prist baron, et ils font letter d'attorney al un pur ceo receiver, que ceo receive accordant; la feme morust, le baron apres morust intestate, et son administrator port accompt pur l'argent. Et adjudge maintainable, quia le receit alter le prop'ty del legacy al baron sole. Sic sur obligac'on al feme et le baron fait letter d'attorney de receiver l'argent, quel ē receive la feme devie, le baron devie, son executor aura accompt pur l'argent.*"

The case is more fully reported in *Goldsborough* (2), where the facts are thus stated:—

"*Huntley* brought a writ of account against *Griffith*, and the case was, that one devised a certain sum of money to a *feme covert* and the husband and wife made a letter of attorney to the defendant to receive the same money of the executor, who did receive it accordingly to the use of the woman, and the husband and wife both die, and the administrator of the woman's husband brings this action." It was argued that the action was not maintainable, on the ground that the husband and wife ought to join in the action, and, if the wife die, the husband hath no remedy. The Court held that the action was maintainable. *Gawdy*, J., said: "It seems to me the action is well brought, for the matter whereon you stand is the letter of attorney, and I say if the husband sole had made the letter of attorney, it had been well enough; and when the money is received to the use of the husband and the wife, now by that the husband hath interest." *Popham*, J.: "I am of the same opinion; for if debt be due to a woman sole upon an obligation, and after she take a husband, and the husband sole make a letter of attorney to *J. S.* to receive that, and *J. S.* receives the same, now the husband sole shall have an account against *J. S.*"

This case has found its way into *Rolle's* Abridgment, *Bacon's* Abridgment, and other text books, and, so far as I know, it has

(1) F. Moore, 452. (2) 2nd Ed. p. 159, pl. 91.

never been impugned. In it, as in the present case, the husband and wife had appointed an agent to receive the money of the wife, he received it and did not pay it over, and it was held that his receipt operated as a conversion of the money. Does the fact that in the present case the wife was an administratrix and was entitled only to a distributive share of the fund make any difference? It appears that the debts of the intestate had been already paid, and therefore the shares of the next of kin under the *Statute of Distributions* were immediately receivable. The shares were present interests. But further than that, I think the decision of the House of Lords in *Cooper* v. *Cooper* (1) shews that the fact that the wife was only an administratrix can make no difference. There Lord *Cairns* read (2) the following passage from *Bacon's* Abridgment: "It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the statute doth not make any suspension, or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors; also this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it does not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over, and not the executor of the first testator." And Lord *Cairns* himself says (3): "For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors." I hold, therefore, that 27-75th of the £163 15*s.* 2*d.* belongs to the estate of *William Barber*, and consequently I allow the surcharge.

Solicitor for Plaintiff: *F. L. Soames.*
Solicitors for Defendant *S. Corpe*: *Hare & Fell.*
Solicitor for Defendant *Chapman*: *C. J. Mander.*

(1) Law Rep. 7 H. L. 53. (2) Law Rep. 7 H. L. 65.
(3) Law Rep. 7 H. L. 65.

FRY, J.
1879
May 1.

BRITISH DYNAMITE COMPANY *v.* KREBS.

[1875 B. 333.]

Decree of House of Lords—How made an Order of Court of Chancery.

An application to have an order of the House of Lords, reversing a decision of the Court of Appeal, made an order of the Court of Chancery, should be made to the Court of first instance, where the decree appealed from was originally made.

IN this case the decision of *Fry*, J., had been reversed by the Court of Appeal in Chancery, but the decision of the Court of Appeal had been reversed, and that of *Fry*, J., affirmed by the House of Lords.

E. Cutler now applied *ex parte* to have the order of the House of Lords made an order of the Court of Chancery, and said that a similar application had been made to the Court of first instance in *Man* v. *Ricketts* (1), and to the Court of Appeal in the later case of *Wentworth* v. *Lloyd* (2), but that, as since the *Judicature Act* the Court of Appeal has no original jurisdiction, it would seem that the application ought to be made to the Court of first instance. The form of order given in *Seton* (3) seemed to shew that the order may be made *ex parte*.

FRY, J., considered that the application was proper, and made the order.

Solicitors: *J. & R. Gole.*

(1) 3 De G. & Sm. 446. (2) 10 Jur. (N.S.) 1113.
(3) 3rd Ed. vol. ii. p. 1160.

ATTORNEY-GENERAL *v.* GREAT EASTERN RAILWAY COMPANY.

C. A.
1879
M. R.
Jan. 14.
C. A.
Jan. 21, 24, 27;
March 25.

Ultrà Vires—Hire of Rolling Stock by one Railway Company to another—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 87.

The railway of the *T. Company* was a short line in connection with the lines of the *G. E. Company* and the *B. Company*, and all traffic which went over it passed over some part of the railways of those companies. By a local and personal Act in 1863, reciting a lease of the *T.* railway to certain lessees for a term to expire in 1875, and reciting that under an arrangement between the *G. E. Company* and the lessees the traffic was worked by the *G. E. Company*, powers were given to the three companies and the lessees to enter into arrangements for the modification of the lease, for the transfer of it to the *G. E. Company* and *B. Company*, or one of them, and for the granting of a new lease to one or both of those two companies; and it then provided that the *G. E. Company* and the *B. Company* might enter into agreements with respect to the working, maintenance, and management of the *T.* railway, or any part thereof, and of the railways of the two last-mentioned companies connected therewith. The *G. E. Company* afterwards became lessees of the *B.* railway for a long term. The lease of the *T.* railway having expired, the *G. E. Company* in 1876 entered into an agreement with the *T. Company* to supply the *T. Company* with locomotive power for five years upon the terms therein mentioned, and with carriages, waggons, and break vans for two years. An action was commenced by the Attorney-General, at the relation of a manufacturer of rolling stock, to restrain the *G. E. Company* from letting rolling stock on hire, and from manufacturing any rolling stock for the purpose of so letting it:—

Held, by the Master of the Rolls, that the agreement of 1876 was *ultrà vires*, and not authorized either by the Act of 1863 or by the *Railways Clauses Consolidation Act*, 1845, s. 87; and that as the *G. E. Company* by their defence claimed the right generally to let rolling stock, there was a case which entitled the Attorney-General to interfere on behalf of the public, and that an injunction ought to be granted; but that there would have been no case of mischief to the public which could lay ground for the interference of the Attorney-General if the *G. E. Company* had only let and claimed the right of letting on hire the rolling stock which they were obliged to have for the purposes of their own line.

Held, on appeal, by *James* and *Bramwell*, L.JJ. (*dissentiente Baggallay*, L.J.), that, apart from the local and personal Act, the letting on hire by the *G. E. Company* to the *T. Company*, whose line was connected with their own and could only be worked profitably in connection with it, parts of their surplus stock was not *ultrà vires*; that if it would otherwise have been so, it was authorized by the local and personal Act.

Held, also, by *James*, L.J., that, if it had been *ultrà vires*, no such case of public mischief was shewn as would entitle the Attorney-General to

C. A.
1879
ATTORNEY-GENERAL
v.
GREAT EASTERN RAILWAY CO.

interfere; the mere fact that a proceeding is *ultrà vires* not being sufficient for that purpose unless injury to the public is shewn.

Held, by *Baggallay*, L.J., that when a company acts in contravention of its powers, it is the interest of the public that the law should be observed, and the duty of the Attorney-General to enforce it.

Attorney-General v. *Great Northern Railway Company* (1) discussed.

THIS was an action by the Attorney-General by way of information on the relation of a person representing the body of manufacturers and dealers in locomotive engines and rolling stock, to restrain the *Great Eastern Railway Company* from letting for hire any locomotive engines or other rolling stock except for the purposes of the traffic on another railway in extraordinary emergencies, and from manufacturing locomotive engines or other rolling stock for the purpose of letting the same on hire, or for any other purpose except for the purpose of being used by the *Great Eastern Railway Company* upon a railway worked by them or some part thereof.

The *London, Tilbury, and Southend Extension Railway* (hereinafter called the *Tilbury Railway*) was constructed under the Act 15 Vict. c. lxxxiv. by the *Eastern Counties Railway Company* and the *London and Blackwall Railway Company*, and the affairs of the undertaking were placed under the management of a joint committee of directors of those two companies. The line was a short line connected with the railways of the *Eastern Counties Company* and the *Blackwall Company*, and having no access to *London* except by those lines. Under the powers of 17 & 18 Vict. c. cxxxiii. the undertaking was leased to *Peto & Co.* for twenty-one years from the 3rd of July, 1854. By the *London, Tilbury, and Southend Railway Act*, 1862 (25 Vict. c. viii.), the holders of shares in this undertaking were incorporated as "The *London, Tilbury, and Southend Railway Company*." The *Eastern Counties Railway Company* afterwards became merged in the *Great Eastern Railway Company*.

In 1863 the *London, Tilbury, and Southend Railway Act*, 1863 (26 & 27 Vict. c. lxix.), was passed. It recited the grant to *Peto & Co.* of a lease which would expire on the 3rd of July, 1875, subject to the powers of the Board of Trade to determine

(1) 1 Dr. & Sm. 154.

the same earlier, and recited that by arrangements between the *Great Eastern Railway Company* and the lessees the traffic on the *London, Tilbury, and Southend Railway Company* (called in the Act the *Southend Railway Company*) was worked by the *Great Eastern Railway Company*, and that the *Great Eastern Railway Company* and *London and Blackwall Railway Company* respectively received a proportionate part of the tolls, fares, or charges in respect of traffic passing over their railways to and from the extension railway, subject to certain deductions for the conveyance of that traffic, and that the lessees were desirous that power should be given to effect such arrangements with reference to the lease as were authorized by the now stating Act, and that it was expedient that the *London, Tilbury, and Southend Railway Company*, the lessees, and the *Great Eastern* and *London and Blackwall Railway Companies* respectively, should be enabled to agree upon such alterations in the terms of the lease, in the arrangements for working the said railway, and in the apportionment of the receipts and expenses as by the now stating Act authorized, and that the *Great Eastern* and *London and Blackwall Railway Companies* jointly or severally should be empowered to take a lease or transfer of the existing lease of the *London, Tilbury, and Southend Railway* upon such terms and conditions as authorized by the now stating Act. Power was then given by sect. 4 to the *London, Tilbury, and Southend Railway Company* (thereinafter called the *Southend Company*), with such sanction of the shareholders as prescribed by the Act, and for the lessees and the *Great Eastern Railway Company* and the *London and Blackwall Railway Company* (thereinafter called the two companies) jointly or severally from time to time to enter into any contract or agreement for all or any of the following purposes, namely, the alteration of the terms of the existing lease—the payment of such annual rent for such period to the *Tilbury Railway Company* as might be agreed upon—the alteration or readjustment of the existing apportionments of the tolls, fares, and charges, and the deductions in respect of the conveyance of the traffic—the transfer to the *Great Eastern Railway Company* and the *London and Blackwall Company* jointly or severally, or the surrender to the *Tilbury Company* of the existing lease—the grant and acceptance by those two com-

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

panies jointly or severally of a new lease of the extension railway, and the payment of such sum or sums of money to the lessees in consideration of the acceptance of such transfer or surrender, or the giving such indemnity, guarantee, or security as might be agreed upon. There followed a series of clauses relative to alterations in the existing lease, and the granting of a new lease to the *Great Eastern Company* and the *Blackwall Company* (called in the Act "the two companies"), or one of them, the consent of the Board of Trade being required to any such alteration or such new lease. It was then further enacted as follows:—

"14. The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway, or any part thereof, and of the railways of the two companies connected therewith, and with respect to the apportionment of the traffic and of the tolls, fares, and charges for traffic on the extension railway and the railways of the two companies, the appointment of a joint committee, or any other matters incident to the carrying out the purposes of this Act." The marginal note to this section was "contracts between the two companies."

"15. The directors of the *Southend Company* and the directors of the two companies respectively may, subject to such sanction of shareholders as by this Act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of this Act, or any objects incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto."

The *Great Eastern Railway Company* afterwards became the lessees for a long term of years of the undertaking of the *London and Blackwall Railway Company.*

The lease granted to *Peto & Co.* expired on the 3rd of July, 1875.

By an indenture dated the 1st of June, 1876, made between the *Great Eastern Railway Company* of the one part and the *Tilbury Railway Company* of the other part, it was provided (Art. 18) that the *Great Eastern Railway Company* should supply the *Tilbury*

Railway Company with locomotive power at such rates of payment and on such terms and conditions as therein mentioned for five years from the 1st of July, 1875; and by Arts. 25 and 26 it was provided that the *Great Eastern Railway Company* should supply the *Tilbury Company* with certain carriages, waggons, and break vans at the rates of payment and on the terms in those articles mentioned; and by Art. 27 it was provided that Arts. 25 and 26 should continue in force for two years from the 1st of July, 1875.

This action was commenced in June, 1877, alleging that the *Great Eastern Company* had lately commenced to let on hire locomotive engines and other rolling stock to divers companies, and among others to the *London, Tilbury, and Southend Railway Company*, and to manufacture rolling stock for the purpose of letting the same on hire. The statement of claim asked for an injunction to the effect above stated.

The *Great Eastern Railway Company*, by their statement of defence, alleged that the *London and Blackwall Railway* and the railway of the *Eastern Counties Railway Company* from the junctions therewith of the extension railway were used for the traffic of the *Tilbury Railway Company*, and that the last-mentioned railway had no passenger or goods stations at any of such junctions, nor any stations in or near *London*, except such as were worked by the *Great Eastern Railway Company*, and that that company had consequently a direct interest in the proper, efficient, and continuous working of the *Tilbury Railway;* that the whole traffic of that railway was worked by means of trains which ran over a part of the lines of the *Great Eastern Railway Company* as well as over the lines of the *Tilbury Railway Company;* and that no engines, carriages, or waggons had ever run over the lines of that company, or any part thereof, which did not either start from or arrive at one of the terminal stations belonging to the *Great Eastern Railway Company* or the *Eastern Counties Railway Company*, or held by them under the lease from the *London and Blackwall Railway Company*, except occasional cattle trains which passed from the *Tilbury* line to the *North London* line without passing over any part of the lines belonging to or held by the *Great Eastern Railway Company*. By paragraph 13 the company

C. A. 1879 — ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

set out the agreement of the 1st of June, 1876, with the *Tilbury Company;* and by paragraph 14 submitted that, under the powers of 26 & 27 Vict. c. lxix., they were authorized and empowered to let for hire to the *Tilbury Company* rolling stock and locomotive power, and for that purpose to enter into the above agreement. They admitted that they had, since the 1st of July, 1875, let to the *Tilbury Company* locomotive power upon the terms of the agreement of the 1st of June, 1876, and were continuing to do so; but stated that they had never, since the 1st of July, 1877, let for hire or supplied to the *Tilbury Company* any carriages or other rolling stock, except upon the special occasions and upon the terms upon which it was customary for one railway company to lend rolling stock to another railway company.

The Plaintiff moved for judgment upon the admissions in the pleadings.

Sir *J. Holker*, A.G., and *Macnaghten*, for the motion, contended that the Defendants were acting *ultrà vires: Winch* v. *Birkenhead, Lancashire, and Cheshire Junction Railway Company* (1).

Chitty, Q.C., and *Smart*, for the Defendants, contended that under the agreement, the 26 & 27 Vict. c. lxix., and sect. 87 of the *Railways Clauses Consolidation Act*, 1845, they were entitled to let engines and other rolling stock to the Defendants; and cited *Midland Railway Company* v. *Great Western Railway Company* (2); *Simpson* v. *Westminster Palace Hotel Company* (3); *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (4); *Attorney-General* v. *Great Northern Railway Company* (5); *Attorney-General* v. *Cockermouth Local Board* (6).

Sir *J. Holker*, in reply, said he should be satisfied with an order preventing the Defendants from making for the future any engines or carriages for the purpose of letting for hire, or from letting for hire any engines or carriages made after that day.

(1) 7 Railw. Cas. 384; 5 De G. & Sm. 562.
(2) Law Rep. 8 Ch. 841.
(3) 8 H. L. C. 712; 2 D. F. & J. 141.
(4) 2 W. R. 330.
(5) 1 Dr. & Sm. 154.
(6) Law Rep. 18 Eq. 172.

JESSEL, M.R.:—

The question I have to decide is really one of very great simplicity, although the Act of Parliament (26 & 27 Vict. c. lxix.) is not drawn as clearly as might be.

The first point is this: The Defendants say that they are entitled to let to the *London, Tilbury, and Southend Railway Company* carriages for hire—and when I say carriages, I mean engines, carts, waggons, coaches, and so forth—the whole of the rolling stock of a railway company. That is what they assert in the 14th paragraph of their statement of defence. They say they were authorized and empowered to let to the *Tilbury Company* rolling stock and locomotive power, and for that purpose to enter into the agreement of June, 1876. Now, that is not a question of general law, but is simply a question upon the construction of an Act of Parliament which I am far from saying is clear; but it does appear to me, upon reading the whole of that Act, and having had the benefit of elaborate argument on both sides, that the Act did not authorize anything of the sort.

The contention on the part of the Defendants is, in substance, that the Act of Parliament authorized the *Great Eastern Railway Company* to enter into a working agreement with the *Tilbury Company*. Now, on spelling out the Act of Parliament, I do not think it did. The recital refers to arrangements then existing, which were in substance these: Messrs. *Peto & Co.* were at that time the lessees, for the remainder of a term of twenty-one years, of the *London, Tilbury, and Southend Railway*, and the firm of *Peto & Co.* had a separate working agreement with the *Eastern Counties Railway Company*, since absorbed into the *Great Eastern Company*. The arrangement which is referred to is the arrangement for working the traffic under that agreement. Then there is a recital that "it is expedient that the *London, Tilbury, and Southend Railway Company*, the lessees, the *Great Eastern Railway Company*, and the *London and Blackwall Railway Company* should be enabled to agree upon such alterations in the terms of the lease, in the arrangements for working the said railway, and in the apportionment of the receipts and expenses as by this Act authorized."

Consequently we get by the recital only to what is "by this Act

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Jessel, M.R.

authorized," that is, alterations in the arrangements for working. The arrangements for working were arrangements specially authorized by Act of Parliament during the continuance of the lease. Those are the things to be altered.

Then we have the 4th section empowering the companies and the lessees to enter into any contract or agreement for all or any of the following purposes; the first of which is the alteration of the terms of the lease; the second is the transfer to the companies, or the surrender to the *Southend Company*, of the existing lease; and the third is the granting and acceptance by the two companies, jointly or severally, of a new lease.

Then we come to the 10th section, which says that "No alteration in the existing lease, and no new lease shall have any operation until it shall be approved by the Board of Trade.

Then the 12th section says, that none of the powers and provisions shall have any effect unless they are assented to by a certain proportion of the proprietors of the two companies, that is, of the *London and Blackwall Railway Company* (which has also since been absorbed into the *Great Eastern* by a perpetual lease) and the *Eastern Counties Company*.

Then the 14th section, as I read it, refers to an arrangement between the *London and Blackwall Railway Company* and the *Eastern Counties Company, inter se*, as to how they will arrange for the working of the *Southend* line, if they come to an arrangement at all with the *Southend Company;* and not, as I read it, to any independent power to make a new working agreement quite irrespective of the lease altogether.

Then comes the 15th section. It is very difficult to see why that was put in, because, as I understand, the 4th section effects the same purpose in substance. The 15th section is this:— [His Lordship read it.] Now, first of all, it was said that the "purposes of the Act" included working agreements generally. I have dealt with that. In fact we know that where there are powers to enter into working agreements in modern Acts of Parliament specific agreements are referred to. Then it is said that "objects incidental to the execution" mean something more. I am utterly at a loss to follow that argument. I admit that there are more words, but beyond that I think they mean nothing.

The "objects incidental," if they are incidental, are "purposes of the Act." If they are not incidental, then, of course, they are not within the "objects incidental." It seems to me that it does not carry the case any further. It cannot be an incident unless the purpose exists, and even if the word "incidental" meant something more than "purpose," there being a case like this where a purpose has been accomplished, the lease having expired, and no new lease having been granted, I do not see how there can be any "object incidental" to that which is non-existent. It appears to me, therefore, that that argument ought not to prevail. It was not pretended that the latter words, which look very general and very wide, carry the case any further.

It seems to me, therefore, that there is no special power conferred upon this company to enter into any agreement which any other company would not have the right to enter into.

Then the second point is this:—It was said that every railway company might do what the Defendants have done under the 87th section of the *Railways Clauses Consolidation Act*. The company in this particular instance is situated in a very peculiar condition, because the *Great Eastern Railway* forms the access to *London* of the *Southend Railway;* and I am told as a fact that every train really runs on a portion of the *Great Eastern* line, and that it must do so for working the traffic; so that it is a state of things exactly within not only the words of the 87th section, but within the purview and meaning of it; which is that there may be an arrangement of traffic between two railway companies whose lines join, and where the trains are to run over both lines.

But, then, all the act authorizes is this,—it authorizes any arrangement by which, if I may say so, you may divide the tolls or fares where the trains of the one company, or the carriages of the one company (for it is not confined to a train), run over the line of the other company, as we know is a common practice of railway companies. I do not mean to say that that arrangement may not be made in a compendious form, or that it must be a division of the tolls taken for every carriage or every train. Of course you may take a lump sum, even if it is a contract with reference to the payment of toll, because it would still be a toll. A lump sum would be as much a toll as a separate sum taken on

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Jessel, M.R.

the passing of every carriage. But still that is all the Act authorizes.

Now, the form of this contract is not according to the Act, nor is the actual substance of it, for the contract is that the *Great Eastern Company* shall provide haulage for all the trains of the *Southend Company*, whether they go over the *Great Eastern* line or not. The contract is absolute, and under this contract, if the *Great Eastern Company* have not locomotive engines of their own available for the purpose, they must construct or hire new ones for the purpose of performing the contract. It seems to me, therefore, that neither literally, nor in substance, is this contract within the terms of that section. I am not prepared to say, and it is no business of mine to say, whether or not that which is in effect the same thing may not be carried out by some modification of the contract.

Then the next point which has been argued—and a very important point it is—is whether there is any injury to the public which entitles the Attorney-General to interfere, Now, I am not prepared to say that there is, if the company had not contended for more than the Attorney-General is willing to allow. But they have contended for a great deal more.

This case is brought before me on a general claim by the company, as I understand, to let for hire, and of course for that purpose to manufacture; for by the 14th paragraph of their statement of defence they submit that they were authorized and empowered to let for hire to the *Tilbury and Southend Company* rolling stock and locomotive power, and for that purpose to enter into an agreement, the agreement of the 1st of June, 1876, namely, that they would provide for the latter company, which of course imposes upon them the obligation of obtaining either by manufacturing or purchasing, or in some way or other, more rolling stock than they want for their own line. It seems to me that that is against the public interest, because that is making a railway company enter into a contract to let for hire not only its own rolling stock which it has in possession—or which it would purchase or manufacture for itself—when not wanted for its own purposes, but any quantity of rolling stock which may be required for working the traffic of another railway. That is carrying on

the business of letting rolling stock, and, it may be, also making rolling stock, which the Legislature has not considered in the interest of the public weal should be carried on by railway companies except for the purpose of enabling them to be carriers on their own line, or for the limited purpose of enabling them to run over adjoining or other lines of railway.

That being so, it seems to me that on the present pleading I am bound to decide against the Defendants, the railway company. But as I said before, what they are doing is obviously not mischievous, because what they are actually doing is only, as I understand, to use the stock not manufactured for this purpose—that is, stock not manufactured for any purpose beyond the ordinary requirements of the *Great Eastern Railway*, including in those requirements the requirements of the *Southend Company* whilst the lease exists. They are under an agreement sanctioned by Parliament, and therefore it would not increase their rolling stock, and the Attorney-General is quite willing to limit his objection so as not to extend to the user on the *London and Tilbury* line of the locomotives now belonging to the *Great Eastern Company*, upon their undertaking not to manufacture any more locomotives for the purpose of being used on that line.

Then there only remains the important question of costs. My view is that the successful party obtains costs, although I think if the relators had understood that the company would be content not to do more than they are now willing to say they will not do, they would not have come with the information at all.

A perpetual injunction accordingly was granted to restrain the *Great Eastern Company*, their directors and others, "from letting for hire any locomotive engines or other rolling stock except for the purposes of the traffic on another railway in extraordinary emergencies, and from manufacturing locomotive engines or other rolling stock for the purpose of letting the same on hire, or for any other purpose except for the purpose of being used by the *Great Eastern Railway Company* upon a railway worked by them, or some part thereof, but this injunction is not to extend to prevent the supply of locomotive engines by the Defendants to the *London, Tilbury, and Southend Railway Company*, under the agreement of

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

the 1st of June, 1876, in the pleadings mentioned, during the remainder of the term therein mentioned, provided that no locomotive engine or other rolling stock manufactured by the *Great Eastern Railway Company* after this day shall be supplied under the said agreement to the *London, Tilbury, and Southend Railway Company*."

C. A.

The *Great Eastern Railway Company* appealed. The appeal came on to be heard on the 21st of January, 1879.

Chitty, Q.C., and *Smart*, for the Appellants:—

We contend that, having regard to the particular position of the three companies—first, on the general law, the *Railway Clauses Consolidation Act*, 1845, and, secondly, on the special legislation with regard to the three companies—the *Great Eastern Company* are entitled to do what they have been doing, and further, that we have not been doing or threatening to do anything which would contravene the order which has been obtained. The case, so far as it is not a question of general law, turns upon the Act 26 & 27 Vict. c. lxix., the 14th section of which provides that "The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway, or any part thereof, and of the railways of the two companies connected therewith, and with respect to the apportionment of the traffic, and of the tolls, fares, and charges for traffic, on the extension railway and the railways of the two companies, the appointment of a joint committee, or any other matters incident to the carrying out the purposes of this Act." The Master of the Rolls called attention to the marginal note, "contracts between the two companies." The two companies are defined in that section to mean the *Great Eastern* and the *Blackwall*, but it could *primâ facie* hardly be considered probable that the Legislature should give to the two companies power to enter into arrangements without the *Tilbury Company* as to the working, maintenance, and management of the *Tilbury Railway*.

[BRAMWELL, L.J.:—I thought you could not properly look at the marginal note of an Act of Parliament. Some of the marginal notes are grossly inaccurate.

JAMES, L.J.:—What authority has the Master of the Rolls for saying that the Courts do look at the marginal notes?]

The Master of the Rolls says that the marginal note is on the roll, and is now part of the Act, and that that is ground for saying you may look to it.

[BAGGALLAY, L.J.:—I never knew an amendment set down or discussed upon the marginal note to a clause. The House of Commons never has anything to do with the amendment of the marginal note. I never knew a marginal note considered by the House of Commons.]

It would be a dangerous rule for the Courts to regard marginal notes, because a marginal note often remains unaltered though the section has been entirely altered in its character as it passes through the committee. The section gives power to the two companies, the words *inter se* not being inserted in the section. As we contend, it is not necessary to import those words into the section if we have regard to the peculiar circumstances of the *Tilbury Company*. Then the 15th section provides that "The directors of the *Southend Company* and the directors of the two companies respectively may, subject to such sanction of the shareholders as by this Act prescribed, enter into any contract or agreement for effecting all or any of the purposes of this Act, or any object incidental to the execution thereof, and every such contract or agreement may contain such covenants, clauses, powers, provisions, and conditions as may be mutually agreed upon between the parties thereto." That section throws us upon the purposes of the Act generally, including the purposes of the 14th section. We say that these clauses authorize the agreement made by sect. 18 of the agreement of 1876. This is an agreement with respect to the working of the line. The Court will not be astute to find that we have been exceeding our powers: *Simpson* v. *Westminster Palace Hotel Company* (1). There is no authority for restraining a company, except where the Court sees that what has been done is an attempt on their part unfairly to exceed the purposes for which they have been incorporated. *Forrest* v. *Manchester, Sheffield, & Lincolnshire Railway Company* (2) is in our favour. The Court

(1) 8 H. L. C. 712. (2) 30 Beav. 40.

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

will look to the general purposes for which the company is incorporated, and fairly look to the acts which they are doing, and the Court will not restrain the proper carrying on of a trade, and the proper management of a railway company. The Attorney-General cannot come here unless he can shew a detriment to the public. In *Attorney-General* v. *Great Northern Railway Company* (1), Vice-Chancellor *Kindersley* lays down the principle that the Attorney-General only interferes where the rights and interests of the public are threatened with injury. It would be absurd to suggest that what has been done in this case is to the injury of the public; and there is not in the statement of claim any allegation of such injury. Any fair arrangement for the working of the *Tilbury* and the *Great Eastern* in connection with one another seems to be covered by clause 15, and nothing in that agreement goes beyond it.

Then, we say we are doing nothing more than we might do under the 87th section of the *Railways Clauses Act*, 1845. It seems to follow from that section that we have the right to send our engines over the *Tilbury* line; and in consideration of the services which are done, we can come to any fair agreement between us with reference to the payment to be made.

[BRAMWELL, L.J.:—That section seems to mean that you may agree to run your engine over their line, paying them, and they may run their engine over your line, paying you. That is not like this case.]

No; but we may send our engine for their benefit over our own line and their line, they paying us a sum in respect of it. It has been held that this section is reciprocal: *Midland Railway Company* v. *Great Western Railway Company* (2). In that case a very similar arrangement was held not to be *ultrà vires*, and *Llanelly Railway and Dock Company* v. *London and North Western Railway Company* (3) is to the same effect.

[BAGGALLAY, L.J.:—Is it necessary to have any allegation that there is injury to the public? There is an allegation to the effect that the law has been broken.]

(1) 1 Dr. & Sm. 154. (2) Law Rep. 8 Ch. 841.
(3) Law Rep. 7 H. L. 550.

It may not be absolutely necessary, but we submit that, unless there is such an allegation upon the pleadings, and if it appears upon the face of the pleadings that there is no injury, then the Court will not interfere. The construction put upon the Act 26 & 27 Vict. c. lxix., by the Master of the Rolls, entirely strikes out the 14th and 15th sections.

[BAGGALLAY, L.J.:—The 4th section having sanctioned the transfer of the existing lease, or the grant of a new lease, you begin with the 8th, and a series of clauses which are to take effect if any arrangements are made for the transfer or making of a new lease. Then you find a succession of clauses to the effect that the lease is to be approved by the Board of Trade, that it is not to affect companies not parties thereto, that it is not to take effect unless approved by three-fifths of the proprietors. Then you have provisions for meetings of the shareholders, and then these two clauses, the 14th and 15th, follow in that sequence. Are they not all portions of the succession of clauses which are to take effect if arrangements are made for a lease?

JAMES, L.J.:—My impression at present is, that I cannot see any limit to the 14th section. There is no heading to it, there is no division of it, and I should read it just in the same way as if there had been only one company instead of two companies. "The said company may enter into arrangements with respect to the working, maintenance, and management of the extension railway.]

On the whole construction of the Act, we submit that one of the purposes of the Act was to authorize an arrangement between the two companies, first of all, as to which, if either, should work the line, and that having been done, to make arrangements between the companies, if there was no agreement with the *Tilbury Company* to carry out the working of the line, and that that is one of the purposes of the Act. There might, under the Act, have been a surrender of the existing lease without a new lease, and in that case there would be no power to make arrangements for working the line unless they are found in the 14th and 15th sections. If there were not, the *Tilbury Company* would have had to work it for themselves, and would have had to stop at that point of junc-

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

tion between the two lines where there was no station and no convenience for transferring the traffic or anything else.

Sir *J. Holker*, A.G., and *Macnaghten*, for the Respondent :—

We contend that the *Great Eastern Railway Company* had no right to enter into this agreement, and that they will have no right when the agreement comes to an end (for the injunction by arrangement between the parties does not apply until the agreement comes to an end) to enter into a similar agreement. We say that no such power was conferred upon them by the Act of 1863.

[JAMES, L.J.:—Under that Act either of the two companies might have taken a lease of the railway and worked it. What principle of law is there that makes the acceptance of the lease a condition precedent to working the railway? Why should not they work without taking the lease? If a man is authorized to do two things, why is it illegal for him to do one of the two?]

If these companies, or either of them, had taken a lease of this line they would have been in the position in which the *Railways Clauses Consolidation Act* places lessees, and they would have been subject to the liability of lessees, but they do not choose to do that.

[JAMES, L.J.:—What has the public to do with that?]

We submit that the question with which we are dealing is not what effect it has upon the public, but whether the railway company is exceeding its powers. This corporation is not authorized to work the line, except in a particular way. It is authorized to take a lease, and takes upon itself, if it does take a lease, the responsibility of the lease, but it is not authorized to enter into an agreement to work this line without taking a lease.

[JAMES, L.J.:—I do not see that it necessarily takes any responsibility. It might have been a lease under such terms that the lessor was liable.]

We submit that under the *Railways Clauses Consolidation Act*, 1845, a lease on such terms could not be granted. Sects. 112 and 113 impose on the lessees the obligation to keep the railway in proper repair, and all the obligations of the lessor. Now this agree-

ment does not in any way impose on the *Great Eastern* the burden of keeping the railway in good repair, and it does not make the lessees responsible for any accident that may happen upon the line; in fact, it distinctly and in terms frees them from such responsibility. The company do not say that it is a lease such as is provided for by the *Railways Clauses Consolidation Act;* what they say is, that under the 14th section of 26 & 27 Vict. c. lxix., there is a distinct power given to the *Great Eastern Railway Company* to enter into an agreement for working this railway. This we deny. Until we reach the 14th section, the sections of this Act confer powers to carry out the purposes of the Act, which are described in the 4th section. Then as to sect. 14, the Master of the Rolls made a remark as to the marginal note, which he considered to be part of the Act of Parliament, as he did also in *In re Venour's Settled Estates* (1).

[BRAMWELL, L.J.:—What would happen if the marginal note differed from the section, which is a possibility, as is shewn in sect. 112 of this Act? Does the marginal note repeal the clause, or the clause the marginal note?]

We apprehend that the marginal note cannot be more than a succinct statement of the clause.

[JAMES, L.J.:—Is it not merely an abstract of the clause intended to catch the eye?]

That may be so; but in this case we contend that the marginal note is right. The Act having given power to the two companies to take a lease of this railway, it was necessary to give power to the two companies *inter se* to make arrangements or agreements as to the traffic or the working of the line. The section says: "The two companies may enter into agreements with respect to the working, maintenance, and management of the extension railway." If the meaning of the Legislature had been that the two companies might enter into agreements with the *Tilbury Company*, they would have said so. If Parliament meant to give the two companies powers to enter into an agreement with the *Tilbury Company* for working its line, it would not have done so by saying

(1) 2 Ch. D. 522, 525.

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

that they might enter into agreements without mentioning the *Tilbury* line at all.

[JAMES, L.J.:—It enables them to enter into the agreement for working, that is to say, it relieves them from any disability; it does not necessarily relieve the *Tilbury Company*. Then we must see whether the *Tilbury Company* have power to do it. Supposing there are two persons under disability, relieving *A.* from his disability to contract with *B.* does not necessarily relieve *B.* from his disability.

BRAMWELL, L.J.:—Supposing it is in terms limited to the *Great Eastern* and the *Blackwall* companies, it is idle to empower them to enter into arrangements *inter se* for a certain purpose to which the assent of a third company is necessary, unless that third company is by implication, or somehow or other, enabled to enter into arrangements.]

We submit that the contrary is here to be implied. The contention on the other side is that before any lease is taken, on the hypothesis that no lease at all is taken by either of these companies of this *Southend Railway*, the two companies are empowered to enter into an agreement for working the *Tilbury Railway*, and the *Tilbury Company* is empowered to enter into an agreement with them to let and work it. We say the section means that the two companies, if they take a lease, may make between themselves all those arrangments and agreements which companies jointly working a line or jointly leasing a line would have to make. All through the earlier sections of the Act of Parliament, when the two companies are mentioned and when the Legislature shews it is intended that the two companies shall do anything, it says, "the two companies jointly or severally," or "the two companies or either of them," shall do so and so. It being contemplated by the Legislature that the *Great Eastern* or the *Blackwall Company* might separately take a lease of this line, is it not strange that when we come to this section, if the section means that the company that is empowered, or the companies or either of them, shall be empowered to make a working agreement, that it should not have said so?

[JAMES, L.J.:—If one of the two companies alone took the lease,

could not the other company which is not taking the lease arrange with that company to work the line ?]

We submit not. The Appellants allege the meaning of the clause to be that these two companies, notwithstanding the fact that no lease of the line was taken, might enter into an agreement with the *Tilbury Company* as to the several matters mentioned in the section. Our contention is that the section only contemplated this: that the two companies might take a lease jointly of the line, and then it was necessary to empower them to enter into agreements with reference to the line of which they took a lease, and all matters connected with it; but that the Act does not authorize a working arrangement between either of the companies and the *Tilbury Company*.

[BAGGALLAY, L.J.:—Probably the parties might have effected all that they purport to effect under this deed of arrangement by a lease which would have fully complied with the terms of the Act of Parliament, but they would have had to get the sanction of the Board of Trade.

JAMES, L.J.:—The *Tilbury Company* had full power in itself to enter into a contract for the hire of carriages and engines, and therefore they do not require any legislative power to do that.]

The *Tilbury Company* could have allowed anybody to run his carriages and traffic on their line, but we submit that they could not enter into an agreement with another company to work the line and supply the locomotives and supply the carriages.

[JAMES, L.J.:—They could not transfer to any other person or company a single power; they could not delegate the powers of the board of directors, they could not delegate the powers of fixing the times for working trains or anything of that kind. Whatever requires statutory power cannot be delegated; but manual labour, and everything connected with manual labour, can be paid for and contracted for.]

Supposing the *Tilbury Company* might have entered into an agreement with the two companies under which the two companies should have been authorized jointly to work the line, surely without statutory powers the *Great Eastern Company* and the *Blackwall*

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Company cannot enter into such an arrangement. Thus we come back to the question whether this section gives such statutory powers.

[JAMES, L.J.:—Your construction of clause 14 requires us to put in these words—"The two companies may, if they shall comply with the condition precedent of entering into a lease, but not otherwise."

BRAMWELL, L.J.:—What do you say about sect. 15?]

It seems to be surplusage; but if it throws any light on the matter it is in favour of our contention. Section 15 is that "the directors of the *Tilbury Company* and the directors of the two companies respectively may, subject to such sanction of shareholders as by this Act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of this Act." By sect. 4 the purposes of the Act were described to be that certain agreements should be entered into between the two companies and the *Tilbury Company;* for example, one of those agreements was the taking of a lease by the two companies. Then it seems to have been thought necessary by the draftsman of this bill that, having given the companies, the *Tilbury Company* and the two companies, power to enter into such an arrangement, it was necessary to go on to say the directors might exercise such power.

[BAGGALLAY, L.J.:—Is sect. 15 anything more than saying how the powers conferred by sect. 4 shall be exercised? As I read sect. 14 it does not apply to the *Tilbury Company* at all.

BRAMWELL, L.J.:—I am inclined to think that sects. 14 and 15 should be read together.]

It would then be extraordinary that you have no mention in sect. 14 of the *Tilbury Company,* but when you come to sect. 15 it is expressly mentioned.

[JAMES, L.J.:—Would there be anything wrong in that? *A.* and *B.* are by one section authorized to enter into arrangements for working the line of *C.*, and *C.* is authorized to make arrangements accordingly. Can clause 15 be confined on any principle to a lease?]

We do not confine it to a lease, but we say it applies to every agreement that may be entered into under the provisions of this Act. We submit that sect. 14 does one of two things. It either contemplates an agreement between the two companies and the *Tilbury Company*, or it contemplates an agreement between the two companies without reference to the *Tilbury Company*. If it contemplates, as the Appellants contend, an agreement between the two companies and the *Tilbury Company*, then it is said that the 15th section is an amplification of that, and gives the necessary powers. That cannot be when sect. 15 says that "The directors of the *Southend Company* and the directors of the two companies respectively may, subject to such sanction of shareholders as by this Act prescribed, enter into any contracts or agreements for effecting all or any of the purposes of this Act."

Now with regard to the general law, the 87th section of the *Railways Clauses Consolidation Act*, when incorporated into the special Act, gives the railway company power to confer running powers on other companies. The Appellants contend that this gives them power to make the arrangements which they have made.

[BRAMWELL, L.J.:—I do not think they can make anything of it.

JAMES, L.J.:—We do not think you need trouble yourself about that.]

Then as to the *locus standi* of the Attorney-General. People come to him saying that a company is taking upon itself to conduct business not authorized by its Act, and that this is against the public good. For the company it is urged that the companies can make locomotives and carriages cheaper than anybody else, and that the public would get the advantage of it. On the other hand, it is said, if you permit this to be done, nobody can compete with these gigantic railway companies, private enterprise will be done away with, and you will get ultimately to a monopoly. If the question were *res integra* it would be a difficult question for the Attorney-General to deal with; but surely the Attorney-General has a right to resort to authorities if he can find any. The Attorney-General in this case had the authority of *Attorney-*

C. A. 1879 — ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

General v. *Great Northern Railway Company* (1), and of an unreported case of *Attorney-General* v. *London and North Western Railway Company*, in which Lord Justice *Baggallay*, who was then Attorney-General, gave the necessary sanction. In that case the *London and North Western Railway Company*, who have gigantic works at *Crewe*, when they had not anything else to do with their workmen, and plant, and capital, used to make locomotives for other companies, and they entered into a contract to make twenty-seven locomotives for the *Lancashire and Yorkshire Railway Company*. The Master of the Rolls said: "No, you are going beyond your powers, and you shall not do it;" and he enjoined them. But is not the question simply whether the railway company is doing what it is not authorized to do by its Act, and if it is doing what it is not authorized to do, ought not the Attorney-General, who has public functions to perform, to draw the attention of the Court to that fact. That seems to have been the view taken by the present Master of the Rolls in the case of *Attorney-General* v. *Cockermouth Local Board* (2).

[JAMES, L.J.:—A local board stands in a very different position from a joint stock company. It is a delegate of the State for the purpose of performing certain public duties.]

The Master of the Rolls did not look at it in that light.

[JAMES, L.J.:—In that case the board were doing something which their Act in terms prohibited.]

If their Act contains no power to do a thing which requires an Act of Parliament to enable the company to do it, is not that the same thing as a clause prohibiting it being done?

[JAMES, L.J.:—I do not follow that.

BRAMWELL, L.J.:—I have the gravest misgivings about it. Assuming the *London and North Western* have a telegraphic arrangement between *London* and *Liverpool* for the purposes of their own business, with communications at other points, then they resolve to carry on a telegraphic business with the world, I apprehend there would be no question that the shareholders could object to that, but could the Attorney-General?]

(1) 1 Dr. & Sm. 154. (2) Law Rep. 18 Eq. 172.

We submit that he could; it would be the same case as *Attorney-General* v. *Great Northern Railway Company* (1). If he could not, then, if the shareholders do not choose to interfere, the largest railway company in the kingdom may manufacture locomotive engines to any extent and sell them, not only to railway companies, but all over the world.

[BRAMWELL, L.J.:—Let me put this case to you. The *Great Eastern* finds itself in connection with the *Blackwall* and the *Tilbury*, and in possession of a large plant, and enters into an arrangement whereby some of its engines work the extension line of the *Tilbury Company*, doing so, not with a view of carrying on the business of a letter of locomotives and plant, but really for the benefit of its own concern. Let me put another similar case. Suppose a gas company found that when its coke was hot it might be conveniently manipulated in a certain way so as to sell more advantageously than if they waited until it got cold, and sold it. Suppose then the company, not for the sake of manufacturing the article, but to make the best of their coke refuse, were to manipulate it in the way I have supposed, would the cases shew that such a proceeding was *ultrà vires*, and must be put a stop to.]

We do not contend that the cases go that length. The question is one of degree. It is an incident of the business of the gas company to dispose of its residue in the best way it can, and if it can dispose of this residue for the purpose, for example, of manure, by mixing it with some other ingredients, it would probably be held justified in buying the ingredients.

It is the province of the Attorney-General, and it is his duty in a proper case, to apply to the Court when a public body deriving its power from an Act of Parliament, transgresses or exceeds its statutory limits. The cases go to shew that the Attorney-General not only may interfere whenever a shareholder may interfere, but may interfere further, because he may interfere where there is no proof of actual injury: *Ware* v. *Regent's Canal Company* (2).

[JAMES, L.J.:—What Lord *Chelmsford* there lays down only comes to this, that if there is such a transgression of an Act of

(1) 1 Dr. & Sm. 154. (2) 3 De G. & J. 212.

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Parliament as to render it necessary on the part of the public to interfere, then the Attorney-General is the person to interfere.]

In *Warden of Dover* v. *London, Chatham, and Dover Railway Company* (1) it is laid down that the Attorney-General is the proper person to complain where a company is exceeding its statutory powers. There are provisions for indictment in the earlier Acts if a company exceeds its statutory powers, and if so, an injunction would lie in order to avoid repeated indictments. The subject of such proceedings under 7 & 8 Vict. c. 85, ss. 15, 16, was discussed in *Attorney-General* v. *Great Northern Railway Company* (2).

[JAMES, L.J.:—That Act, as far as it goes, is not in your favour, because it seems to imply that, before the Attorney-General is put into motion, the Board of Trade shall be satisfied that there is a sufficient wrong done. Railway companies are not public enemies; it was not intended that they should be harassed and annoyed for trifles.]

We admit that we must shew a substantial excess of the powers of the Act.

[JAMES, L.J.:—An excess producing a substantial damage. Vice-Chancellor *Kindersley*, in *Attorney-General* v. *Great Northern Railway Company*, came to the conclusion that there was a substantial public mischief, not merely that there was a technical violation or a technical excess. Whether I should have agreed with him is a different matter; but upon the question of fact he came to the conclusion that there was a substantial public mischief done, and that therefore the Attorney-General ought to interfere, and the Court ought to assist him.]

We submit that a more satisfactory foundation to rest upon is that it is a public injury for a public body like a railway company to go to Parliament and obtain powers, and then, as it were, set Parliament at defiance, and confer further powers upon itself without going to Parliament at all.

[JAMES, L.J.:—According to *Attorney-General* v. *Great Northern Railway Company* the Court must exercise its discretion, and the

(1) 3 D. F. & J. 559. 7 Jur. N.S. 453 (2) 1 Dr. & Sm. 154. 6 Jur. N.S. 1

Attorney-General ought to exercise his discretion as to whether a sufficient case is made out for the interference of the Court. We do not mean to contend that any technical violation would do, we admit that it must be such as the Attorney General in his discretion first of all, and the Court in its discretion afterwards, thinks of sufficient magnitude to warrant an injunction.]

In *Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company*, Lord *Hatherley* says (1): "The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed." This, we submit, is a wholesome jurisdiction, and there is now no other way of keeping railway companies within their limits. Bills by shareholders with that view have been very rare, if indeed there have been any since the case of *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (2).

Then comes the question, What is the proper limit to the powers of a railway company, and when can it be said to exceed those powers? *Colman* v. *Eastern Counties Railway Company* (3), which has been referred to in the House of Lords, and always with approval, clearly lays down the law that companies constituted by Act of Parliament have power to do all such things as are necessary or proper for the purpose of carrying out the intention of the Act of Parliament, and that they have no power of doing anything beyond it.

[BRAMWELL, L.J.:—That was a suit by a shareholder. He might say, "You are breaking your bargain with me."]

We contend that whenever a shareholder may interfere the Attorney-General may interfere, if he succeeds in persuading the Court that the excess is of sufficient importance. In the present case there can be no question that a shareholder could interfere if he thought it worth his while. This contract might involve the *Great Eastern Company* in very serious liability. They contract to supply the engines to the other company; supposing there was some accident on that line which was properly traced to their

(1) Law Rep. 4 Ch. 194, 199.
(2) 4 D. F. & J. 126.
(3) 10 Beav. 1.

7 Jur. N. S. 887.

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

default, and supposing £100,000 was recovered against the *Tilbury Company*, the *Tilbury Company* would have a right over against the *Great Eastern Company*.

[JAMES, L.J.:—Would not the liability be exactly the same in taking a lease?]

The measure of pecuniary damage would be the same, but Parliament has jealously guarded leases of working powers.

[JAMES, L.J.:—That was not for the protection of the shareholders, but for the purpose of preventing an improper delegation of statutory powers.]

This company, by working without a lease, is doing without the sanction of the Board of Trade that which it can only do with the sanction of the Board. There are three cases: a railway company may have running powers over the line of another company; or it may have a working agreement; or there may be a lease. Running powers are granted by 8 Vict. c. 20, s. 87. What those powers are, and how far they extend, has been discussed in *Simpson* v. *Denison* (1) and *Winch* v. *Birkenhead, Lancashire, and Cheshire Junction Railway Company* (2). Working agreements are a very different thing, and are not within the Act of 1845, but come under the *Railways Clauses Act* of 1863 (26 & 27 Vict. c. 92), which carefully provides that every working agreement and every alteration in a working agreement shall have the sanction of the Board of Trade. It is therefore not likely that Parliament would authorize these companies to enter into working agreements without such sanction.

[JAMES, L.J.:—The general Act was passed after the private Act of 1863. How can the private Act then be construed by the general Act?]

Then as to the Act 26 & 27 Vict. c. lxix., we submit that there are only two purposes in it; one to make alteration in the existing lease, if the parties agree to do so, and the other to grant a fresh lease, or a new lease, to the two companies, or one of them. Sect. 15 is, in its terms, wide, and apparently without limit; but there must be some limit, inasmuch as sect. 10 expressly provides

(1) 10 Hare, 51. (2) 5 De G. & Sm. 562.

that no alteration of the existing lease, and no new lease shall have any operation until the same has been approved of by the Board of Trade. It would be absurd to suppose that Parliament gave the directors an unlimited power by sect. 15 to enter into an agreement which would enable them to dispense with the sanction of the Board of Trade.

[JAMES, L.J.:—As I read it, no alteration in the lease is to be made without the sanction of the Board of Trade, but the directors of the *Tilbury Company* may enter into any contract or agreement, not being an alteration in the lease, or a new lease. We must construe the two things together, and they could not under the 15th section repeal the 4th. Up to the 13th section the provisions seem to be all connected with the lease; then the 14th, 15th, 16th, and 17th, are entirely on other matters.]

The Act says that it is expedient that certain purposes, specified and defined, should be effected, that those purposes cannot be effected without the Act of Parliament, and then it proceeds to enact; and the only two purposes are, alterations in the existing lease, and a new lease. The Act does not appear to contemplate a working agreement at all, except after a lease has been granted.

Smart, in reply:—

We do not deny that if a corporation exceeds its powers so as to cause material injury to the public, the Attorney-General may interfere; but we contend that material injury must be shewn. *Brice* on *Ultrà Vires* (1). I submit that Mr. *Brice* has, to a certain extent, misunderstood the cases, and has treated the Court as laying down that the Attorney-General may interfere when the Court only said that no one but the Attorney-General can. In *Attorney-General* v. *Great Northern Railway Company* (2) there was a considerable public wrong. The company, if they became coal merchants, would practically get a monopoly of the sale of all the coal so situate that it would be carried by their line.

[BAGGALLAY, L.J.:—Assuming that the Act of Parliament prohibited the company from doing some particular thing, but they did it, and no injury arises either to individuals or the public

(1) 2nd Ed. p. 900.

(2) 1 Dr. & Sm. 154.

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

generally in respect of what has been done, do you say that the Attorney-General in that case ought not to interfere?]

No; because it is to be assumed that the doing an act which Parliament has prohibited must be injurious to the public.

[BAGGALLAY, L.J.:—Lord *Eldon* said in *Blakemore* v. *Glamorgan Canal Company* (1), that where companies obtain these powers by Act of Parliament, they obtain them on an undertaking, not only that they will do what they are empowered to do, but will abstain from doing anything else.]

If the *Great Eastern Railway Company* were claiming a general right of applying their funds to the manufacture of rolling stock and letting them to other companies, we admit that the Attorney-General would be right in coming here; but we are not carrying on the trade of letting locomotives for hire. This is a line which runs into our line, and which has a common traffic. We have entered into this agreement under which we are to provide carriages for working the traffic, and the *Tilbury Company* pays us something for it; but it is not a letting for hire in the ordinary sense, as if we were totally distinct railways.

[BAGGALLAY, L.J.:—Assuming that the effect of the arrangements made between the companies enables them to do that which, according to the true construction of the Act of Parliament, they can only do by the granting of a lease, and the granting of a lease could only be effected by the permission of the Board of Trade, then is there not in avoiding the assent of the Board of Trade such a departure from the provisions of the Act of Parliament as would justify the Attorney-General in interfering?]

If we were entering, without the sanction of the Board of Trade, into an agreement which would enable us to do everything which we could do under a lease it would be difficult to support such an agreement, but this agreement is not of that character. A lease transfers the whole of the powers to the lessees—all the powers of regulating traffic; all the powers of dealing with foreign traffic coming upon it; all the powers of putting up signals; such an arrangement requires the consent of the Board of Trade; but here all the statutory powers remain in the *Tilbury Company*.

(1) 1 My. & K. 154, 162.

Then as to the special Act, the question is: what are the purposes of the Act? The Plaintiff says there are only two—an alteration in the terms of the existing lease, and the granting of a fresh lease. The 14th section clearly shews that the working, maintenance, and management of the extension railway is one of the purposes of the Act, and there is nothing to shew that that is to be restricted to the present lease, or to the continuance of the new lease to be granted under the powers.

1879. March 25. JAMES, L.J.:—

22 LJ 374

At the time of the commencement of the transactions which led to this action, there were three railway companies, the *Eastern Counties*, the *Blackwall*, and the *Tilbury*.

The *Eastern Counties* and the *Blackwall* were much connected together and have since been amalgamated, and by union and growth have become the very great line called the *Great Eastern*. But while they were distinct lines the *Tilbury* line was projected. It was so projected and originally constituted in connection with and as an off-shoot from them; but, some years afterwards, the *Tilbury Company* was incorporated as a distinct corporation. The only access of the *Tilbury* line to *London* is by means of what was the *Eastern Counties* on the one side, and the *Blackwall* on the other, and all its through traffic to and from *London* is from and to the *London* stations of what is now the *Great Eastern Company*.

The *Tilbury* line appears to have been what is called a contractor's line and was leased to Messrs. *Peto & Co.*, and, while under lease to them, was worked by means of the locomotives and rolling stock of the *Eastern Counties*. In this state of things an Act was passed (26 & 27 Vict. c. lxix.), intituled "An Act to authorize arrangements between the *Tilbury and Southend Railway Company* and the lessees of their undertaking, and the *Eastern Counties* and *London and Blackwall Railway Companies*, with reference to the lease and working of the *London, Tilbury, and Southend Railway*, and for other purposes." This Act recites the history of the *Tilbury* line up to a certain time, it recites that a lease had been given to *Peto & Co.*, determinable upon giving

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. James, L.J.

twelve months' notice to the lessees, and then it recites, that by arrangements between the *Great Eastern Company* and the lessees, the traffic on the *London, Tilbury, and Southend Railway* was worked by the *Great Eastern*, and that the *Great Eastern* and the *London and Blackwall Companies* respectively received a proportionate part of the tolls in respect of traffic passing over their railway to the *Tilbury Railway*, and so on, and that the lessees were desirous that powers should be given to effect such arrangements with reference to the lease as were by this Act authorized, and that it was expedient that the *Tilbury Company* and their lessees, and the *Great Eastern* and the *Blackwall Companies* respectively, should be enabled to agree upon such alterations in the terms of the lease, and in the arrangements for working the said railway, and in the apportionment of the receipts and expenses as by this Act authorized, and that the *Great Eastern* and the *Blackwall Companies*, jointly or severally, should be empowered to take a lease or a transfer of the existing lease of the *Tilbury Company*. Then there are certain powers enabling those companies to take a lease, there are powers to make arrangements with the lessees, and power to transfer to the two companies, and the provisions are to be subject to the approval of the Board of Trade, and then come two clauses, the 14th and the 15th, to which I shall refer more particularly afterwards.

The lease to Messrs. *Peto* expired, and then the *Great Eastern* continued to supply locomotive power and rolling stock for the working of the *Tilbury* line, under an agreement which was made by an indenture between the *Great Eastern Company* of the one part and the *Tilbury Company* of the other part, which after various recitals contains clauses for the working of the traffic, the apportionment of the tolls, and various other purposes; and then it contains special provisions as to running powers and various things which are usual between railway companies, such as the use of the stations, and so on. Then it contains this: "The *Great Eastern Company* shall supply the *Tilbury Company* with locomotive power at a price fixed per train mile for passengers, goods, &c." And then as to the supply of carriages: the *Great Eastern Company* undertook to supply carriages not exceeding sixty in number, at an annual rent, and to keep them in repair, and they

agreed also to supply further carriages not exceeding another number of sixty, at a rate to be fixed—so much a day for each carriage. There was a similar clause as to the supply of goods waggons.

This action is brought by the Attorney-General at the instance of certain relators, who may be considered as representing the body of manufacturers of and dealers in locomotive engines and rolling stock, and its object is to have it declared that the *Great Eastern Company* is acting *ultrà vires* and illegally in carrying on this business of what may be called jobbers of locomotives and carriages. The Master of the Rolls was of opinion that it was illegal, and that it was an illegality which the Court ought, at the instance of the Attorney-General, as representing the public, to restrain. On the argument of the appeal three views of the case were presented by the Appellants' counsel: first, that there was nothing, even in the absence of express Parliamentary authority, wrong in what the *Great Eastern* were doing; secondly, that there was such Parliamentary authority, if required; thirdly, that the Attorney-General, as representing the public, had no right to call for the intervention of the Court, or, to put it in another form, that it was not such a case of sufficient public wrong as to make it the duty of the Court to interfere with the company in the conduct of its own business. I have arrived at the conclusion that the Appellants are right in each of these contentions.

Upon the first, it appears to me that the arrangement which was made with Messrs. *Peto* in the first instance, and afterwards with the *Tilbury Company*, was a reasonable and proper, and therefore legitimate, incident of the proper business of the *Great Eastern Company* as owners and workers of and carriers on their own line. The traffic on the *Tilbury* line, from the very nature of things, can only be profitably carried on in connection with that of the *Great Eastern*. It is manifestly, in my opinion, for the safety and convenience of the public that the same engines, the same carriages, the same staff, should be employed to do all the work, instead of one set doing part and another set doing another part of it. It is obviously for the profit of the two companies that such arrangement should be made, otherwise they would not have made it. There is, as it seems to me, no pretence whatever

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

James, L.J.

for saying that this is a sham or a colour for enabling the *Great Eastern Company* to enter into some distinct business outside the Act of Parliament, which constitutes the deed of partnership between the shareholders. If it had been a private partnership carrying on the business of working the *Great Eastern Railway*, it would have been just the arrangement which the managing partner would have entered into. It is not pretended that the *Great Eastern* have exceeded the capital which they are authorized to raise, nor that they have diverted from their own line and traffic proper any part of that capital required to enable them to fulfil the duties imposed on them or undertaken by them in respect of such line and traffic. They have, of course, a sufficient margin of engines and rolling stock, or they would not have been able to fulfil their agreement with the *Tilbury Company*, and if they should at any time find themselves overstrained by that additional demand on their resources in that respect, they can have no difficulty in obtaining from the relators or others on hire a sufficient supply to make good the deficiency. It appears to me that, whether as regards a private partnership, a joint stock company, or an incorporated company, in the absence of fraud or deliberate perversion, the majority of managing partners may be trusted, and ought to be trusted, in determining for themselves what they may do, and to what extent they may go in matters indirectly connected with, or arising out of, their business relations with others. It is no part of the business of partners in a great shop to be money lenders, but I should think it very strange if it was held unlawful for one of them to take a bill or cheque from a customer, handing him the balance over his account in cash. I recollect a case of an attempt being made to restrain an insurance company from paying or contributing to losses which were not technically covered by the terms of their insurances, but it was answered by the Court that such liberality was a legitimate mode of preserving and increasing their customers: *Taunton* v. *Royal Insurance Company* (1). Where is this notion of *ultrà vires* to extend to? Is it *ultrà vires* for a railway company to make a profit from the sale of meat and drink at its refreshment rooms? Would it be *ultrà vires* for two companies, whose lines are con-

(1) 2 H. & M. 135.

nected, to have joint workshops for the construction or repair of their rolling stock, or joint depôts of coals and other stores, or to enter into a joint contract with such persons as the relators for the hire of rolling stock, and to apportion the costs and expenses between themselves according to the respective train miles run on their several lines? Would it be *ultrà vires* for one company to let another company have the use of part of its offices, warehouses, and ground?

As regards the second question. Supposing that this agreement should be held to require Parliamentary authority, it appears to me to be plainly authorized. [His Lordship read the 14th section of 26 & 27 Vict. c. lxix.] I am unable to find any implied restriction on the words of this section. It authorizes the *Eastern Counties* and the *Blackwall Companies* as between themselves to make arrangements for working the *Tilbury* line. If as between themselves they are authorized to do it, then it seems to me that they are necessarily authorized as between themselves and the public, and of course as between themselves and the owners of the *Tilbury* line. The latter did not require any Parliamentary authorization, for of course it is to the latter (and to the public, so far as the public are concerned) wholly immaterial from whom they, the *Tilbury Company*, hired their power and rolling stock; and it is not denied that, so far as the *Tilbury Company* is concerned, they might have made with the relators, or with any other private person, the very bargain they have made with their neighbours, the *Great Eastern*. But if necessary, there is the express sanction of the 15th section, which enabled the directors of the *Southend Company* and the directors of the two companies to enter into any agreement, subject to the sanction of the shareholders, for carrying out all or any of the purposes of this Act; and one of the purposes of the Act, as it appears to me, was the arrangement which the two companies, the *Great Eastern* and *Blackwall*, might make for working the extension railway. It is to be noted that the Legislature recognised and impliedly sanctioned the letting to *Peto & Co.*, and if it was not *ultrà vires*, or an improper employment of the property of the company, to let to *Peto & Co.*, the lessees, it would be very singular indeed that it should become *ultrà vires* and improper to make exactly the same letting to the

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

James, L.J.

Tilbury Company, the lessors, on the expiration or determination of the lease. And what was to be done with the working of the traffic; what was to be done with the engines and carriages used for it, if the lease had been suddenly determined by the default of the lessees?

It was suggested in the course of the discussion, that this arrangement might be a device to escape the power of control which Parliament gave to the Board of Trade as regarded leases. It appears to me that that control was given for a very different and very intelligible purpose. An actual lease of the line involves a transfer of the Parliamentary powers and of responsibilities, and there are strong reasons for giving to the Board of Trade power to see that such transfer is made to proper and sufficient persons, persons proper to be entrusted with the Parliamentary powers, and sufficient to answer such responsibilities, and that the lease is not likely to affect the interests of the public by unduly diminishing competition, or diminishing the conveniences for the public, the providing of which was the original consideration for the Parliamentary powers conferred on the company. I can easily conceive the case of a company getting a lease of a parallel, or nearly a parallel line, for the very purpose of practically closing it; a thing, of course, to be prevented. It was for some such purposes as that, with a view to some such considerations as I have stated, that I conceive the sanction of the Board of Trade to be required to a lease; but I cannot conceive the Board of Trade's interfering with such a thing as the taking or letting on hire locomotive power and rolling stock. The Board of Trade may be like an elephant's trunk, capable of tearing up a tree or picking up a pin, but I do not conceive that the Legislature intended it to be employed in picking up such a very small pin as the agreement before us.

I propose dealing with the third question raised before us, the rather because the Attorney-General pressed us to state our views of it, especially having regard to some decisions on the subject. In my judgment, where the matter is a mere matter of *ultrà vires*, that is, whether the managing partners of a concern are or are not doing something outside their charter, Act of Parliament, or deed of settlement, there ought to be some plain and sufficient

public mischief shewn to warrant a suit on behalf of the Sovereign or the public. It is not, in my opinion, sufficient to say the thing complained of is *ultrà vires*, and that it interests the public; that whatever may be the nature or extent of the excess complained of, the excess should be at once stopped, so that bodies incorporated and established by Act of Parliament should be taught to keep within their strict lines. I cannot accede to any such view of the duty of the Attorney-General or of this Court. Where a company entrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanour, and ought to be at once stopped. In the case of *Attorney-General* v. *Great Western Railway Company* (1) the railway company was prohibited by law from opening a line before it was passed by an engineer appointed by the Board of Trade, a provision intended for the safety of people's lives, and they were going to disregard that prohibition, and it was no answer for them to say that the line was so safe that no mischief could arise. The company was, of course, restrained from this violation of an express compact with the Legislature. Again, in the case of *Attorney-General* v. *Cockermouth Local Board* (2), the Board were doing works which would or might probably poison a running stream, in direct violation of the law which prohibited them from committing a nuisance. These seem to me good illustrations of the cases in which it is essential for the protection of the public and of individuals that the Attorney-General should interfere.

But take the case of a railway company taking more of a man's land than it ought to take, or doing its works in a manner which he has a right to complain of, the Attorney-General would leave him to protect himself, and certainly would not be heard in this Court in a suit at his relation, and certainly much less at the relation of a rival company or carrier. It would be different if what it was doing affected a whole district, which could shew an actual *damnum* as well as a theoretical *injuria*. In the case before Vice-Chancellor *Kindersley* of the *Attorney-General* v. *Great Northern Railway Company* (3) the Vice-Chancellor did proceed on

(1) Law Rep. 7 Ch. 767.
(2) Law Rep. 18 Eq. 172.
(3) 1 Dr. & Sm. 154.

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. James, L.J.

the ground that it was a matter of grave damage and injury to the public. Of course, if such a company as that were allowed to embark in a gigantic coal business, it is easy to see that coal proprietors were not likely to be served on the line as they ought to be served, and there might arise other inconveniences. I am far from saying that a railway company ought to be permitted to carry on the trade of ironmasters, or colliery proprietors, or rolling stock manufacturers, not casually, not incidentally, not collaterally, in the *bonâ fide* conduct of their own property and business, but as really a distinct and separate trade. I can conceive that such a case might be properly considered by the Attorney-General, and considered by this Court, as a fraud on the Legislature which had created and authorized the company only for what it professed and undertook to do; but, at all events, it must be something great, something substantial, to warrant such interference. It is not possible to define what is, for this purpose, great, what is substantial, any more than it is possible to define how much of smell or how much of noise amounts to a nuisance, or what is or is not reasonably incident to a business. But, generally speaking, it is not practically difficult to ascertain when the line has been clearly transgressed, and in this case, speaking for myself, I should say that the facts do not shew any ground of complaint on the part of the public, even if the agreement had been made out to be theoretically *ultrà vires*. And it is, in my judgment, to be considered, for the purposes of this action, that there is no real difference between a body of shareholders incorporated by special Act of Parliament for the purpose of making and working a railway, and a body of shareholders incorporated under the general law (now applicable to large associations) for the purpose of establishing and working any other industrial enterprise. So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other. But even in these cases it is only where some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or nonfeasance, that the Attorney-General ought to interfere. If a particular landowner has cause of complaint, it is for him to appeal to the tribunals. If as between the com-

pany and its shareholders there is a wrongful application of the capital, or a wrongful incurring of liabilities, it is for the shareholders to complain; if as between the company and any persons outside the company, it is entering into contracts *ultrà vires*, it is for such persons to take proper advice and guard themselves from risks which they are perfectly free to avoid. I cannot myself see any principle on which the Attorney-General is to interfere with a railway company's contracts because they are *ultrà vires* any more than he would on the like ground interfere with the contracts of any other incorporated joint stock company, carrying on any other industrial enterprise. In neither case is it, in my judgment, for the Attorney-General to take up the complaint of a rival trader who says that the company is trading in something which it was not established or incorporated to trade in. I cannot think that it is for the Attorney-General to invoke the Court, nor for the Court so invoked, to interfere to prevent a gigantic iron and coal joint stock company incorporated from opening stores, however vast and however miscellaneous, for the supply of its workmen and neighbours.

On these grounds I am unable to concur in the judgment of the Master of the Rolls, and I give my voice for discharging the order he has made.

BAGGALLAY, L.J.:—

I much regret that I have been unable to arrive at the same conclusions as my colleagues with respect to this appeal, and though the fact of my taking a different view can have no effect as regards the order to be pronounced, I think it right to explain the grounds upon which, in my opinion, the order of the Master of the Rolls ought to be affirmed.

A long series of authorities has declared the true effect and meaning of the powers conferred by Acts of Parliament by or under which railway and other companies formed for carrying out large commercial undertakings have been for the most part incorporated, and I deem it of the highest importance, in approaching the consideration of questions similar to those involved in the present appeal, to guard against breaking in upon the general principles established by these authorities.

C. A. 1879

ATTORNEY GENERAL v. GREAT EASTERN RAILWAY CO.

Baggallay, L.J.

The policy of the legislation of the last half century in relation to such companies has, from time to time, been doubted, and is, indeed, still doubted by many whose views and opinions are deserving of the highest consideration, and the general principles to which I have alluded have not been established without much difference of opinion, but it must, nevertheless, be now accepted as settled law, that corporations created by statute, whether by special Acts of Parliament, as in the case of railway, gas, and water companies, or by memoranda of association deriving their force from the provisions of the Joint Stock Companies Acts, have not the same powers, privileges, and general incidents as are the attributes of common law corporations, but such powers, privileges, and incidents only as are conferred upon them by their special Acts or memoranda of association. Nor can such companies be regarded in the light of private partnerships; their shareholders are not exposed to the liabilities and risks to which the members of private partnerships are subject, and their creditors have not the same remedies for obtaining payment of what may be owing to them as have the creditors of private partnerships. They have, moreover, ordinarily conferred upon them powers of directly interfering with the property and interests of others, and the Legislature, whilst deeming it for the public interest to confer such powers and privileges upon the companies, has also thought fit, according to the construction which has been judicially placed upon their enactments, to define the limits within which such powers and privileges may be exercised.

Acting upon these principles, Courts of Equity have interfered to restrain directors of railway companies from applying any portion of the corporate funds to purposes not strictly within the objects of their incorporation, and Courts of Common Law have held that the deed of any such company, though under its corporate seal, does not bind it if the deed amounts to a contract to do an act not authorized by its constitution, or, as the doctrine has been sometimes enunciated, if it appears by the express provisions of the statute creating it, or by necessary or reasonable inference from its enactments, that the deed is *ultrà vires*, in other words, that the Legislature means that such a deed should not be made.

The general principles involved in these decisions have been repeatedly recognised and approved by the House of Lords, and notably so in the cases of *Eastern Counties Railway Company* v. *Hawkes* (1), *Shrewsbury and Birmingham Railway Company* v. *London and North Western Railway Company* (2), and *Taylor* v. *Chichester and Midhurst Railway Company* (3); and these decisions of the House of Lords are of importance not only as establishing the general principles to which I have alluded, but by reason of their express approval of leading decisions in Courts of Equity and Common Law, which serve to illustrate and distinguish the classes of objects which are and those which are not within the scope of the constitution of railway companies. Amongst others, approval has always been expressed of the decision and *dicta* of Lord *Langdale* in *Colman* v. *Eastern Counties Railway Company* (4), in which that learned Judge held that the circumstance of the proposed application of the company's funds being for the probable benefit of its shareholders, or even for a purpose of such public or national importance as to make it proper to grant legislative authority to so apply it, was not to be regarded in considering whether such an application of its funds was within the statutory powers then possessed by the company. Again, the case of *Munt* v. *Shrewsbury and Chester Railway Company* (5), decided by the same Judge, and other cases with which we are all familiar, illustrate the uniform practice of all the Courts before which such questions have arisen, of keeping railway companies strictly within the limits of their powers and of checking what might appear to be very slight excesses.

In the comparatively recent case of *Ashbury Railway Carriage and Iron Company* v. *Riche* (6) the same general principles were enunciated in the House of Lords in terms at least as decided as in the earlier cases. It is true that, in that case, the question which called for the decision of their Lordships was whether a certain contract was authorized by the memorandum of association of a company, constituted under the *Companies Act*, 1862; but there is no distinction between statutory corporations under

(1) 5 H. L. C. 331.
(2) 6 H. L. C. 113.
(3) Law Rep. 4 H. L. 628.
(4) 10 Beav. 1.
(5) 13 Beav. 1.
(6) Law Rep. 7 H. L. 653.

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY Co. Baggallay, L.J.

railway and other similar Acts, and statutory corporations under the *Companies Act*, as regards the extent of their powers to enter into contracts or to deal with their corporate funds; both are limited in the exercise of their powers to purposes within the scope of their constitution, though as regards the former, we have to look to their Acts of incorporation, and as regards the latter to the memoranda of association, to ascertain what these purposes are. In this case of *Ashbury Railway Carriage and Iron Company* v. *Riche*, the present Lord Chancellor, in moving the judgment of the House, made use of the following language (1): "In a case such as that which your Lordships have now to deal with it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects of the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which by the Act of Parliament they were prohibited from doing."

To fully appreciate the force of the words which I have just quoted, it is necessary to bear in mind that it had been urged in the course of the arguments that all contracts, except such as were expressly or by necessary implication forbidden, were within

(1) Law Rep. 7 H. L. 672.

the powers of the company by reason of its being a corporation, and that, although the contract in question might have been *ultrà vires* of the directors, whose delegated powers were limited to the purposes defined by the memorandum and articles of association, it might be rendered binding by the subsequent assent of the shareholders. With reference to this argument, Lord *Selborne* made the following observations (1) :—"I think that contracts for objects and purposes foreign to or inconsistent with the memorandum of association are *ultrà vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do."

I may here observe that the limits which judicial decisions have imposed upon the powers legally exerciseable by commercial companies incorporated by statute have been uniformly recognised by the Legislature. Not only the Consolidation Acts, which are incorporated with the special Acts, but the special Acts themselves recognise the necessity of conferring special powers upon the companies, beyond those incident to their corporate character, to enable them to enter into contracts, or to spend their corporate funds, or to do any other acts or things for furthering, or in connection with, purposes which are beyond the scope of their constitution; not a special Act passes to enable one company to lease its railway to another without a statement in the preamble that the granting such a lease would be of great public advantage, but that it cannot be effected without the authority of Parliament, a statement of the want of authority on the part of the company to do that which would admittedly be of great public advantage, unless such authority is specially conferred upon it; even working agreements between two companies whose railways are continuous depend for their validity on powers, either general or special, conferred by statute. As an illustration of the extent to which the Legislature has gone in recognising the necessity for legislative sanction, to enable companies to effect purposes beyond the scope

(1) Law Rep. 7 H. L. 694.

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Baggallay, L.J.

of their original constitution, I may mention that in one of the statutes to which our attention has been directed during the arguments on the present appeal—19 Vict. c. xv.—there is a statement in the preamble that the companies then authorized to work the *Tilbury Railway* had obtained a supply of water at *Southend* by means of boring, and that it would be of advantage to the inhabitants of *Southend*, which was badly supplied with water, if the companies were authorized to supply water to any company or person desirous of contracting for the same, but that such purpose could not be effected without the authority of Parliament, and, by the enacting part of the statute, the companies were authorized to sell water from their works at *Southend*, but were restrained from laying down or expending any portion of their capital in laying down any pipes for the conveyance of such water beyond the limits of their own property. The water which the companies were so authorized to sell was in excess of what they required for their own purposes; it would be useless and unprofitable to them if they were unable to sell it, whilst the sale of it would result in a certain profit, but the sale even of that which would otherwise be waste water was not within the scope of their constitution, and would consequently be *ultrà vires*, unless express authority were given to the companies to enable them to make such sale, and such express authority was consequently given, but accompanied by a restriction which shews how jealously the Legislature guards against the limited powers conferred upon such companies being exercised beyond the local limits assigned for their operations.

I will now proceed to consider the circumstances of the case with which we have at present to deal. They are somewhat singular. The *Great Eastern Railway Company*, which is a company possessing not only the ordinary powers usually conferred on railway companies, but also special powers under various Acts of Parliament, and particularly under an Act (26 & 27 Vict. c. lxix.), to which I shall have occasion presently to refer, by an instrument under its corporate seal, and bearing date the 1st of June, 1876, contracted with the *Tilbury Railway Company* to supply that company with locomotive power, and also with carriages and goods waggons for certain specified periods of time and upon certain other specified terms and conditions. The

contract so entered into by the *Great Eastern Company* has been held by the Master of the Rolls to be *ultrà vires* of that company; but so far from restraining the company from applying any portion of its corporate funds in giving effect to it, he has thought it right, having regard to the very special circumstances of the case, to allow the company to carry out the contract, though he has granted an injunction in general terms, restraining the company, its directors, servants, and agents from letting for hire any locomotive engines or other rolling stock, except for the purposes of the traffic over another railway in extraordinary emergencies; and from manufacturing locomotive engines or other rolling stock, for the purpose of letting the same on hire, or for any other purpose except for that of being used by the company upon a railway worked by it.

I propose to consider presently the special circumstances which led the Master of the Rolls to make this order, which is the order now under appeal, but I think it will be convenient to consider, first, whether that which the company has been restrained from doing, would, if done by it, be in excess of its statutory powers, and whether, also, the contract of the 1st of June, 1876, was one into which it was beyond the scope of its authority to enter.

Now, having regard to the established general principles to which I have referred, it can hardly be doubted, as a general proposition, that *Railway Company A.* would be acting in excess of its powers, were it, in the absence of any special powers authorizing it in that behalf, to enter into a contract with *Railway Company B.* to let to *Company B.* such locomotive engines or other rolling stock as *Company B.* might require for the purposes of its traffic. In a greater or less degree, according to the circumstances of any particular case, the supply by *Company A.* of engines or rolling stock in performance of such a contract must necessitate the providing and keeping in good working order of a greater number of engines, or a larger quantity of rolling stock, whether manufactured by *Company A.* or otherwise acquired, than would be requisite for the proper working of its own railway; and the maintenance of such a supply of engines and rolling stock would render necessary the employment of a portion of the funds of *Company A.* It can in no way be said that in the absence of

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Baggallay, L.J.

special powers such an employment of its funds would be within the scope of the constitution of *Company A.*; however profitable the carrying on of such a trade or business might be, it would not be one of the purposes for which the company was incorporated. And if, instead of supplying locomotive engines on hire, *Company A.* was to bind itself to provide locomotive power, in other words, to provide not only the engines, but also the fuel for their consumption, and the wages of sufficient servants to work them, there would be a necessity for a still larger employment of its funds.

But, admitting the general proposition to be that the entering into any such contract would be in excess of the powers of *Company A.*, the question arises whether it would be applicable to the case of two companies whose railways are continuous, as are those of the *Great Eastern* and *Tilbury Companies.* In my opinion the proposition is as applicable to such a case as to one in which the systems of the two companies are quite distinct: the circumstance that the *Tilbury Railway* is or may be regarded as an extension or continuation of or as a branch from the *Great Eastern* system, renders it highly desirable that some arrangement should be come to for such a working of the two systems as should avoid the inconveniences to the public, and the consequent loss to the shareholders, which would necessarily arise if they were worked separately; but to effect such a working in no way necessitates the entering into such a contract as that which we are now considering; under similar circumstances the inconvenience and loss arising from separate working are usually avoided by the adoption of one or more of the following schemes:—First, by the one company exercising, either by agreement or under statutory authority, running powers over the line of the other; secondly, by the companies availing themselves of the powers conferred on them by the 47th section of the *Railways Clauses Consolidation Act*, 1845, and arranging for the trains of each company passing over the lines of the other, upon terms arranged between them; or, thirdly, by obtaining statutory powers, under which the line of the one company can be leased to the other, in which case the leased line is worked as if it were part of the general system of the other company. But each and every of these schemes can be efficiently

carried out, and as between other companies have been repeatedly carried out, without any letting of locomotive engines or rolling stock, or any contract for the supply of locomotive power by the one company to the other.

Now adequate powers have been obtained for the lease of the *Tilbury Railway* to the *Great Eastern Company*, but, for some unexplained reason, it has not been deemed expedient by the two companies to adopt this mode of arranging for the working of their respective railways as component parts of a continuous system. It is also worthy of note that, by the agreement of the 1st of June, 1876, the two companies have made arrangements under which each company has acquired running powers over portions of the railways of the other, and provision is made for through booking over their respective lines. These arrangements are doubtless for the convenience of the public, and will carry their own profit, but they could be quite as efficiently carried out if the *Tilbury Company* used their own engines and rolling stock, instead of renting them from the *Great Eastern Company*, or being supplied by that company with locomotive power.

It has been suggested that that which the *Great Eastern Company* has been enjoined from doing might be done by them, or, indeed, by any railway company under the provisions of the 87th section of the *Railways Clauses Consolidation Act*, 1845; but the powers conferred by that section are limited to the making of arrangements for the passage of the trains of one company over the railway of another, and for the division or apportionment of the tolls taken on their respective railways—arrangements which are perfectly independent of the sources from which either company obtains its engines and rolling stock or its locomotive power. The competency which we are now considering is not the competency of the *Tilbury Company* to hire instead of manufacturing or buying their engines and rolling stock, but the competency of the *Great Eastern Company* to manufacture or buy more than they require for working their own railway, and to let the surplus stock for hire to the *Tilbury Company;* in other words, to carry on for profit a trade or business other than that which was authorized by their Act of Incorporation. I can arrive at no other conclusion than that such purposes are *primâ facie* foreign

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Baggallay, L.J.

to the purposes of a railway company, and in the absence of special powers are *ultrà vires*.

But it is urged on behalf of the *Great Eastern Company*, that special powers have been conferred upon them by the statute 26 & 27 Vict. c. lxix., and that under the provisions of that statute they were authorized and empowered to let locomotive power and rolling stock to the *Tilbury Company*, and consequently to enter into the agreement of the 1st of June, 1876. In my opinion the statute in question conferred upon them no such power.

On the 22nd of June, 1863, the date of the passing of that statute, the *Tilbury Railway* (which was referred to in the statute as the *Extension Railway*) was in lease, under statutory powers, to Sir *Samuel Morton Peto* and others for a term of years which would expire on the 3rd of July, 1875, and was being worked by the *Great Eastern Company*, and that company and the *Blackwall Railway Company* were respectively entitled to proportionate parts of the tolls, fares, or charges in respect of traffic passing over their railways to and from the *Tilbury Railway*, subject to certain deductions for the conveyance of that traffic. The preamble of the statute stated these several circumstances, and that the lessees were desirous that power should be given to effect certain arrangements with reference to the lease, and it further stated the several objects which the statute was intended to effectuate, viz.: first, the enabling the three companies, that is, the *Great Eastern*, the *Blackwall*, and the *Tilbury Companies*, and also the lessees, to agree upon certain alterations in the terms of the lease, in the arrangements for working the *Tilbury Railway*, and in the apportionment of the receipts and expenditure; and, secondly, the empowering the *Great Eastern* and *Blackwall Companies*, jointly or severally, to take a lease, or transfer of the existing lease, of the *Tilbury Railway*.

Much stress has been laid by the counsel for the Appellants upon the reference in the preamble to alterations in the arrangements for working the *Tilbury Railway*, and it has been contended that it indicated an intention on the part of the Legislature to confer powers upon the three companies to make any arrangements they might think fit for working the *Tilbury Railway* as

well after the expiration as during the continuance of the existing lease, and without any necessity for the *Great Eastern* and *Blackwall Companies*, or either of them, to accept a new lease after the expiration of the existing one. I am unable to take this view of the language used. In any view of the case, it would be a very strained construction; but when the reference in the preamble to proposed alterations in respect of several matters is taken in connection with the immediately preceding recitals of the existing arrangements in respect of the same matters, the conclusion appears to me irresistible that the proposed alterations are in existing arrangements. And this view is confirmed when we come to the 4th section of the enacting part of the statute, which is the section declaring the purposes of the Act. That section enables contracts or agreements to be entered into for three several leading purposes: first, for alterations in the existing lease, whether transferred or not; secondly, for the surrender of that lease or the transfer of it to the *Great Eastern* and *Blackwall Companies*, or one of them; and, thirdly, for the grant of a new lease to the same two companies, or one of them, and also for certain other minor purposes incidental to these three; and by the 10th section it is enacted that no alteration of the existing lease and no new lease shall have any operation until the same shall have been approved by the Board of Trade.

The 4th section confers no power except in connection with a lease present or future, and the scope of the statute is to provide for the working of the *Tilbury Railway* by the *Great Eastern* and *Blackwall Companies*, or one of them, under a lease from the *Tilbury Company*, either the existing one or a new one to be granted on its expiration, but subject to the approval of the Board of Trade, and subject also to the provisions of the *Railways Clauses Consolidation Act* relative to leases of railways. The working of the *Tilbury Railway*, under arrangements to be made between the companies, freed from the provisions of the *Consolidation Act* and from the control of the Board of Trade, however much it may have been the object of the companies to secure it by the adoption of the contract of the 1st of June, 1876, is, in my opinion, contrary to the scope of the statute. But it has been urged upon us, that however inconsistent it may appear to be that the Legis-

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Baggallay, L.J.

lature should so carefully guard against any improper exercise by the companies of the restricted powers of working the *Tilbury Railway*, which it has conferred upon them, and should, at the same time, give them unrestricted powers of doing the same thing in another way, such unrestricted powers having in fact been conferred upon them, and the 14th and 15th sections of the statute are referred to in support of this contention. Now the 14th section simply confers power upon the two companies, that is, the *Great Eastern* and the *Blackwall Companies*, to make arrangements *inter se*, not arrangements with the *Tilbury Company*, for the working and management of the *Tilbury Railway* and of their own railways connected with it—a power which would be exercise-able in the event, and in that event only, of the two companies becoming joint lessees, and for the exercise of which there can be no occasion, now that the *Blackwall Railway* by reason of the lease of it for 999 years to the *Great Eastern Company* has become part of the general system of that company. The 15th section, whatever may be the extent of the powers conferred by it, is clearly confined to contracts or agreements for effecting the purposes of the Act, which purposes do not, according to the view which I have expressed of the general scope of the Act, include the entering into working agreements otherwise than in connection with or incidental to a lease of the *Tilbury Railway*, duly transferred or granted to the two companies or one of them, in pursuance of the powers in that behalf conferred by the Act.

I have arrived therefore at the conclusion that the *Great Eastern Company* had not authority, either under the general powers possessed by it in common with other companies whose Act of Incorporation incorporate the Consolidation Acts, or under the special powers conferred upon it by the statute 26 & 27 Vict. c. lxix., to enter into the contract of the 1st of June, 1876, or to do any of the acts or things which it has been enjoined from doing by the order of the Master of the Rolls. I pass on to consider the special circumstances of this case which led the Master of the Rolls to make the order appealed from, and whether such special circumstances justified the order so made.

I have hitherto dealt with the agreement of the 1st of June, 1876, as a contract for the supply of locomotive power, but as

originally executed it was also a contract for the supply of general rolling stock, including carriages, goods waggons, and luggage and brake vans.

Now it is to be observed that the contract for the supply of the rolling stock other than locomotive engines expired before this action was commenced, and that the contract for the supply of locomotive power was for a period terminating on the 1st of July, 1880, having, therefore, only two and a half years to run at the date of the order of the Master of the Rolls. In addition to this the *Great Eastern Company* had, for several years previously to the date of the agreement (the 1st of June, 1876), and with the sanction of the Legislature down to the 3rd of July, 1875, when the *Peto* lease expired, though without any such sanction after that lease had come to an end, supplied locomotive power and rolling stock for the general working of the *Tilbury Railway*, and the engines and other rolling stock supplied for such purpose were necessarily in excess of what was required for the use and working of its own railway, and for such excess of engines and rolling stock, or the greater portion of them, the *Great Eastern Company* would have no employment after the expiration of the *Peto* lease, unless they continued to work the *Tilbury* line or let the engines and rolling stock to the *Tilbury Company* to enable it to work its own railway. Under these circumstances, and apart from any considerations arising out of the *ultrà vires* character of the transaction, there would not appear to be anything unreasonable in the *Great Eastern Company*, after it had ceased to work the *Tilbury* line, letting to the *Tilbury Company* that which would otherwise be useless and unprofitable to the *Great Eastern Company*. It is true that that company could legitimately, though perhaps not so profitably, have disposed of such rolling stock by sale, or have reserved it for future use on its own railway without incurring the obligations imposed upon it by the contract with the *Tilbury Company;* but I nevertheless agree with the Master of the Rolls in thinking that the contract, though *ultrà vires*, could hardly be considered mischievous, and for this reason, and having regard also to the difficulty arising from the circumstance of the *Tilbury Company* not being a party to the action, I further agree with him in thinking that it was not unreasonable

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Baggallay, L.J.

that any injunction, which upon the general merits of the case he should deem it right to grant, should not extend to restrain the performance of the agreement of the 1st of June, 1876.

But there is another view of the case. The statement of claim had charged the *Great Eastern Company* with having commenced to let on hire locomotive engines and other rolling stock to divers companies and persons, and amongst others to the *Tilbury Company*, and to manufacture rolling stock for the purpose of letting the same on hire, and with having in particular entered into the contract of the 1st of June, 1876. In reply to this charge, the *Great Eastern Company* did not limit their defence to a justification of their having entered into the agreement of the 1st of June, 1876; but by the 14th paragraph of their statement of defence they insisted that, under and by virtue of the powers and provisions contained in the statute 26 & 27 Vict. c. 69, or otherwise, they were authorized and empowered to let rolling stock and locomotive power to the *Tilbury Company*. This was an assertion of a general right, and the contract of the 1st of June, 1876, was merely referred to as an instance or example of an exercise by the company of the general right claimed. And the arguments on the part of the Appellants, both in the Court below and before us, were to the like purport. It was further insisted on behalf of the Appellants, that the contract of the 1st of June, 1876, was substantially an agreement under the 87th section of the *Railways Clauses Consolidation Act*, 1845.

I have already stated my opinion to be, and have assigned my reasons for so holding, that neither of these contentions can be supported; but for the purpose of ascertaining the extent of the claim asserted, and of determining whether the acting under the asserted claim should be restrained, it is necessary to consider the nature and extent of the contracts into which it would be competent for the *Great Eastern Company* to enter, upon the assumption that such contentions were well founded.

If the *Great Eastern Company* had the general power claimed, of entering into contracts for supplying locomotive power and letting all kinds of rolling stock to the *Tilbury Company*, they would be under no obligation to limit their contracts to the short periods fixed by the contract of the 1st of June, 1876; it would be

open to them to enter into contracts, with all their attendant risks, to supply all such locomotive power and rolling stock as the *Tilbury Company* might require for any number of years. Again, if the Appellants are right in their contention that the contract of the 1st of June, 1876, is substantially an agreement under the 87th section of the *Railways Clauses Consolidation Act*, there is nothing to prevent the *Great Eastern Company*, or indeed any other railway company, from entering into similar contracts with any and every other railway company whose railways are continuations of or branches from their own, or over which they have or can arrange for through traffic, if indeed their powers could be limited to this extent, and the performance of such contracts must impose, upon the companies entering into them, the obligation of either manufacturing or buying the necessary rolling stock, and of procuring the necessary fuel, and of engaging and paying the necessary servants. That the *Great Eastern Company* are manufacturers of engines and other rolling stock appears from their statement of defence, though they assert that they so manufacture for purposes within the scope of their powers, as interpreted by themselves.

Upon the whole, it appears to me that the claim asserted by the *Great Eastern Company* is one which, if it is well founded, would enable them to carry on a very large and a very speculative trade, and one which, in my opinion, it is not within the scope of their constitution to legitimately carry on; I think, further, that though the particular contract into which the company has entered is one the performance of which it is not, under the circumstances, necessary to restrain, it is, nevertheless, a contract into which they were not competent to enter; and that, taking this circumstance into consideration in connection with the general claim asserted and insisted upon, the case was one which called for the interference of the Court, and that the order made by the Master of the Rolls should be affirmed.

It has been objected that it was not competent to the Attorney-General to sue in the present action, though it might have been open to a shareholder to interfere for the purpose of preventing an improper application of the corporate funds. In my opinion this objection cannot be sustained. If the view which I have

C. A. 1879 — ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. — Baggallay, L.J.

taken of the general merits of the case is correct, the *Great Eastern Company* have exceeded their powers, though under circumstances admitting of extenuation, and have asserted a general right to exceed them in the same direction to any extent they may think fit: in other words, they have done and threatened to do that which the law has forbidden them to do. It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed, as in my opinion it has been by the *Great Eastern Company*, it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues *ex officio*, or at the instance of relators.

I am unable to distinguish this case in principle from that of the *Attorney-General* v. *Great Northern Railway Company* (1), decided by Vice-Chancellor *Kindersley* eighteen years ago, and the authority of which has never to my knowledge been questioned. In that case the information was at the relation of a coal merchant, and its object was to restrain the Defendant company from carrying on the business of coal merchants. In that case, as in this, it was contended on behalf of the Defendants that the wrong complained of, if it was a wrong, was not in itself an illegal act as against the public, though it might be as against a shareholder, and that the Attorney-General could not maintain an information on behalf of the public, but the law and the practice in this respect were declared by the Vice-Chancellor in the following terms, in which I entirely agree (2):—"Wherever the interests of the public are damnified by a company established for any particular purpose by Act of Parliament acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the Attorney-General to protect the interests of the public by an information."

BRAMWELL, L.J.:—

The first question in this case is whether (setting aside the statute 26 & 27 Vict. c. lxix.) the Defendants have done or are doing or threatening to do something unlawful in the matters complained of. It is said that what they have done, are doing, and threaten-

(1) 1 Drew & Sm. 154. (2) 1 Dr. & Sm. 161.

ing to do is unlawful—contrary to law. The reason given is that it is *ultrà vires*, that they have no power to do it, and that as they have no power to do it, it is unlawful. To shew that they have no power to do it, the Acts under which they are created and constituted are referred to, and, certainly, among the things expressed that they may do is not to be found the letting of locomotives on hire. There is no prohibition of doing it, but there is no permission. It is said that because they are not empowered or permitted, they are prohibited; and that they are, therefore, disobeying an Act of Parliament, and so breaking the law. This is, undoubtedly, contrary to one's general idea that, unlike some countries where it seems as though nothing is lawful save what is permitted, here in England everything is lawful save what is prohibited. It is opposed to those free trade and *laissez faire* notions which are commonly supposed to have something in them, and under the influence of which some people think that England has thriven considerably. It is said by Mr. *Brice* that this doctrine or notion was first put into operation in the cases of *Attorney-General* v. *Great Northern Railway Company* (1), and *East Anglian Railways Company* v. *Eastern Counties Railway Company* (2). I was counsel for the Plaintiff in the latter case. I know none at Common Law before it in which a trace of this doctrine is to be found, and, certainly, I was never more surprised than at that decision—a decision that proceeded on grounds which, with all respect be it said, were erroneous, and led, as I believe they have in other cases, to an erroneous result. The mistake was in not distinguishing that many of the provisions of Acts of Parliament constituting companies are not provisions as between the companies and the public, but agreements among the shareholders *inter se* which constitute their agreement of partnership, their instrument of settlement. In the case of *Attorney-General* v. *Great Northern Railway Company*, it was said that where, in the case of injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the Acts creating it, it is competent to the Attorney-General, in case of injury to public interests from such a cause, to file an information for an injunction. But, I ask,

(1) 1 Dr. & Sm. 154. (2) 11 C. B. 775.

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Bramwell, L.J.

with sincere respect for the learned Judge, what is the similarity of or analogy between the two cases, and what is the injury to public interests in such a case? how is the public injured, or any class of it? When directors of a company do that which is not authorized by their act or charter, or deed of settlement, they break their agreement of partnership. What is there like that when the whole company, directors and shareholders, do something not agreed on in their agreement of partnership? It may be unlawful on other grounds, but the cases are not like, they are wholly different. It is to be noticed that the only case cited by the learned Vice-Chancellor is a case of a complaint by a shareholder. However, these cases were followed by others, and it became the law that acts *ultrà vires*, in cases of corporations, were not merely null and void, but were absolutely contrary to law, and illegal. I am not doubting the least that there is a reasonable and well-founded doctrine of *ultrà vires*. I refer for a statement of it to what was said by Lord *Cairns* in *Ashbury Railway Carriage and Iron Company* v. *Riche* (1), and, if I may be permitted to do so, I refer to what I said twenty years ago in *Bateman* v. *Corporation of Ashton* (2). I have no doubt that a shareholder, not consenting, has a right to object to an act not within the terms of the partnership. I have no doubt, also, that if a thing is prohibited by the statute creating a corporation, the doing of that thing is unlawful, and may be restrained. I have no doubt that, if a corporation is created by royal charter, and the provisions of the charter are disobeyed, the charter is jeopardized. I have no doubt that, if a railway company is prohibited from opening their railway with a single line, it may be restrained from doing so, that the pollution of a river, forbidden by law, may be restrained, and that other acts contrary to law, or contrary to a duty to or right of the public, may be restrained or punished. My doubt is where there is no prohibition, and the act is not contrary to any duty towards or in violation of any right of the public, whether it can be the law that if six partners carried on the trade of hatters, they might agree to deal in boots; but that if seven associate themselves in a registered company, as hatters, their dealing in boots is not only *ultrà vires*, but unlawful—an offence possibly punishable. I

(1) Law Rep. 7 H. L. 653. (2) 3 H. & N. 323.

admit it is *ultrà vires*, that is decided in *Ashbury Railway Carriage and Iron Company* v. *Riche* (1). The public is entitled to hold a registered company to its registered business.

There is a noticeable thing in this *ultrà vires* doctrine. It is recognised and acted on in Courts of Common Law, as nullifying *ultrà vires* contracts, but it is apparently always enforced against offenders in Courts of Equity only. But if acting *ultrà vires* is unlawful, surely there must have been a remedy for or power of preventing it at law before the *Judicature Act*. I mean a remedy at the instance of the Crown. No doubt a mandamus would lie to enforce the performance of a duty in a corporation to do a thing ordered by statute or charter; but is there any case of a mandamus not to do a thing, not to let, for instance, carriages on hire? No doubt, also, in some cases, a criminal information would lie where an illegal act was done. But is it supposable that one would lie here? If it would, so would an indictment, as the act is illegal. Then it is said that a *quo warranto* may be maintained. So it may in some cases, but what usurpation of a franchise is there here? I cannot but entertain great doubt if there is any way of reaching this matter at common law, and consequently great doubt if there ought to be any in equity: *Attorney-General* v. *Utica Insurance Company* and *Attorney-General* v. *Tudor Ice Company* (2). However, the law has been so laid down that I think we ought to be governed by it, whatever doubts I may have of its original validity, and that the only utility in discussing its origin is to try and find out its principle and extent, and see if any particular case is within it. Now, what have these Defendants done here? They are not letters on hire of locomotives and rolling stock. They do not carry on, nor profess to carry on, such a trade or business. What has been done is this. The Appellants are owners of, and work a very large extent of, line (1300 miles). I believe they have a vast number—many hundreds—of locomotives. The *Tilbury Company* are owners of a small line, having access to *London*, to which their traffic mainly goes, only over the lines of the Appellants. They have not and never had any locomotives. Their line has been worked by lessees from its opening down to the year 1875, and since then it has worked its traffic in

(1) Law Rep. 7 H. L. 653. (2) Cited in Brice on Ultrà Vires, 2nd Ed. p. 905.

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Bramwell, L.J.

the following manner:—The Appellants furnish to the *Tilbury Company* locomotive power and rolling stock sufficient for the *Tilbury Company* to work their traffic. The agreement as to the locomotive power is that sufficient engine drivers, stokers, coals, and all necessaries save water, for working the locomotives, shall be furnished by the Appellants to the *Tilbury Company*, that during their use by the *Tilbury Company* the men shall be servants of that company, that the remuneration to the Appellants for what is called the hire of the rolling stock shall be at a certain rate. This agreement has been acted on, and was so at the time of the commencement of this action, and has been so since. That it is for the benefit of the two companies, or was when they made it, is certain. We ought to be satisfied of that from their having come to it. Probably, also, the working of the *Tilbury* line by the men employed by the *Great Eastern Company* who are familiar with the approaches to *London* is beneficial to the public. There can be no doubt that the Appellants are deeply interested in the *Tilbury* traffic. Anyhow, the arrangement was come to by the companies for their supposed benefit, not for profit as letters to hire, and no pretence of injury or wrong to the public or any individual is suggested. Of course, we have heard about great companies getting a monopoly, but as the Attorney-General admitted, if they get it in such a case as this it is because they can undersell everybody else, which, as he said, is not a thing for the public to mourn over. But the pretence is idle. Individual energy and competition will keep the private trader in possession of part of such a trade as that here in question. However, some locomotive makers, with a view to their personal gains, complain, and under their auspices the case comes before us. Whether the Attorney-General has any discretion to refuse the use of his name, I know not. If he has, and has decided to let it be used, I am most certain that he has not done so without due consideration, or from any other motive than a sense of duty. Nobody has suggested that there is any question of public policy involved in the present case, unless the danger of monopoly. However, there are the decisions, and they must be obeyed, whatever we may think of the motives of the relators, which seem of the same character as objections to machinery, or to doing more than a certain quantity

of work in a certain time, or any other mischievous objection to liberty of action, which we blame so heartily in trades unions, and which these relators would be loud in condemning in their workmen. But the decisions have not gone to the extent of saying that nothing can be done but what is expressly mentioned in the Act incorporating the company. There may be a ferry boat to aid railway traffic, book stalls may be let, refreshment rooms kept, and other things done which may be called ancillary or subordinate to the main purpose of the railway company, or arising out of or consequent on its existence. I hold that this letting on hire is such a case. Suppose on an emergency rolling stock was wanted, might it be let for a day? If so, for a week, or month, or year? Suppose it was found that there was an excess of stock which could profitably be let. Is it to remain idle that these relators may have the chance to make a few more? Take the case of a gas company, and suppose it could work up the coke when hot more profitably than it could if cold, may it not be done? Must they sell their coke cold to others who must heat it? Here the *Tilbury Company* had no rolling stock. Unless they hired of some one, their line must remain unworked, to the public injury and loss of tolls to the Defendants. Of no one could the *Tilbury Company* hire so cheaply as of the Defendants. I am of opinion then that this arrangement is not *ultrà vires*, even without the particular statute which I proceed to examine.

I am also of opinion that this arrangement is allowed by that statute, 26 & 27 Vict. c. lxix. Let us examine that Act. There were the three companies and the lessees. It is manifest that negotiations had existed among the parties interested. It is clear that the Act contemplates that the lease might be surrendered without a new one being made. It was absolutely certain that it would expire in twelve years, and it might be determined in a year. Now is it not almost certain that it would be contemplated that the *Great Eastern* and *Blackwall Companies*, or one of them, could advantageously for all parties work the *Tilbury* line without a lease, and that provision would be made enabling them to do so? Accordingly the title of the Act is to authorize arrangements between the *Tilbury Company* and the lessees and the two companies with reference to the lease and the working

C. A. 1879 ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO. Bramwell, L.J.

of the *Tilbury* line, not with reference to the working thereunder, that is, under the existing or any other lease, but with reference to the lease and with reference to the working. There are also the words "and for other purposes." Then the preamble recites the facts, and that the traffic on the *Tilbury* line is worked by the *Great Eastern Company*. It is strange, be it said in passing, that if this was *ultrà vires* and illegal it should be recited as one fact on which the legislation is based. Then it recites that it is expedient that the four parties should be enabled to agree upon alterations in the terms of the lease, in the arrangements for working the railway, and in the apportionment of the receipts. This is not under the lease only, for its surrender was contemplated, but an arrangement under a lease, if there was one, and otherwise if there was not. Then comes the enacting part. The first thirteen sections deal with the existing lease, its surrender, and the granting of a new one, and an alteration or readjustment of existing apportionments of tolls, &c. Then comes sect. 14. I am at a loss to see the object of this section, unless it relates to something other than where a lease exists. Suppose it refers to the two companies, what does it enable them to do, if there is a lease, which the Act had not already enabled them to do? If they might jointly take a lease, it must follow that they might make such arrangements as mentioned in sect. 14. It is hardly supposable that it meant that one might take a lease and then agree with the other that the other should maintain, work, and manage. But that section must be read in connection with sect. 15, and what is the meaning of that? It is confessed that, on the construction of the Attorney-General, it is unmeaning. The Master of the Rolls says: "It is very difficult to understand why that was put in, because, as I understand, the 4th section effects the same purpose in substance." I agree, but with submission, if a reasonable and useful meaning can be given to those sections, it ought to be done, rather than treat them as idle and useless. It may be that sect. 14 relates to agreements between the two companies only, but they may be agreements for the working, maintenance, and management of the *Tilbury Company*, and the apportionment of tolls and traffic on that line, which would be nugatory without the consent of the *Tilbury Company;* and then comes sect. 15, which shews that

agreements may be made with it,—that it may enter into *contracts* or *agreements*. Now, no doubt, leases as a rule are or contain contracts, but they are not spoken of by the word "contract" or "agreement," because the primary object of the lease is the creation of the estate, and the contracts and agreements are only consequential and ancillary. Then, if a lease is meant, the "subject to such sanction of shareholders as by the Act prescribed" is superfluous, as that has already been provided for. Besides the contracts may be for all or any of the purposes of the Act, and incidental thereto. Further, the contract may contain such convenants, clauses, powers, &c., as may be mutually agreed upon between the parties thereto. But by sects. 9 and 10 a restriction is placed on the power of putting whatever clauses in the lease may be acceptable to the parties. It may be said that, if this reasoning is correct, it shews only that the Appellants might work the *Tilbury* line. But it is impossible to suppose that if they may do that, they may not do what they have done. The difference is in words only. Nothing turns on the liability to passengers. Those who undertake to carry are liable if there is default; all that would be necessary to avoid this objection would be for the Appellants to say they would work the line, the *Tilbury Company* finding stations, servants, water, and carriages.

It is said that if so the condition that the Board of Trade must approve the lease may be avoided. Why the Board of Trade was to have a voice in the matter I know not. Perhaps it is a bit of that meddling, inspecting legislation of which we have so much. However, there it is. It may be that a lease is an important definite thing generally for a length of time, and so it attracted attention, and was thought worth supervision, while a mere working arrangement was not so considered. However, there that is, and all we can say is, that the Legislature thought the supervision of the Board of Trade necessary to a lease, and did not think so as to a working arrangement. A matter which seems remarkable in this case is this: The injunction does not stop the illegal practices —the execution of the unlawful agreement. That it permits. What it prohibits is what is threatened, or rather claimed as a right. But is a threat only sufficient? And if the thing is unlawful, not merely *ultrà vires*, should a Court of Law permit it?

C. A. 1879

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

It results that here is an illegality made by Parliament the basis of legislation, and permitted to continue by a Court of Law!

I am of opinion that the judgment of the Master of the Rolls should be reversed.

Action dismissed with costs.

Solicitors: *Hargrove & Co.; Capel A. Curwood.*

C. A. 1878 M. R. *May* 18. C. A. 1879 *March* 24; *April* 4, 7, 9.

In re BESANT.

*Infant—Custody—*36 & 37 *Vict. c.* 12, *s.* 2—*Covenant in Separation Deed—Father's Rights—Ward of Court—Religious Education—Misconduct of Mother—Atheism.*

By a covenant in a separation deed executed after the passing of the *Infants' Custody Act*, 1873, a father agreed that his infant daughter should remain in her mother's custody during eleven months in each year. The mother held and promulgated atheistical opinions, and refused to allow the child to receive any religious instruction. She also published and circulated an obscene book. The child was made a ward of Court, being then about eight years old:—

Held, that, to bring up the child in the religion of her father was a duty which the Court owed to its ward, and was unaffected by the covenant in the separation deed; and also that the refusal of religious instruction to the child and the publication of the obscene book were in themselves sufficient grounds for removing her from the custody of the mother.

The decision of *Jessel*, M.R., affirmed.

18 Ch. D. 677.

THIS was a petition by the Rev. *Frank Besant*, the Vicar of *Sibsey*, in *Lincolnshire*, and his daughter, *Mabel Emily Besant*, an infant, by her father as next friend, asking that the infant Petitioner might be delivered up by her mother, *Annie Besant*, to the custody of her father. A sum of money had been settled and paid into Court to make the infant a ward of Court.

Mr. and Mrs. *Besant* were married in 1867, and they had two children—a boy born in 1869, and the infant Petitioner, born in August, 1870. Differences arose between Mr. and Mrs. *Besant* in consequence of Mrs. *Besant* having embraced atheistical opinions, and on the 25th of October, 1873, a deed of separation was exe-

See and Case Besant v. Wood for further case husband ante 12 Ch D. 605 Ed.

cuted, by which it was agreed that Mrs. *Besant* should have the entire custody of the girl for eleven months of the year, Mr. *Besant* having the custody of her for the remaining month, and in like manner that Mr. *Besant* should have the custody of the boy during eleven months of the year, Mrs. *Besant* having the custody of him for the remaining month.

From that time the husband and wife lived apart, Mrs. *Besant* taking care of the girl, and Mr. *Besant* of the boy, according to the terms of the deed of separation.

In 1874 Mrs. *Besant* commenced to write books advocating atheistical opinions, and in February, 1875, she also commenced to lecture publicly in support of the same views. In September, 1877, she entered into partnership with Mr. *Charles Bradlaugh* as a publisher, and in association with him published various atheistical books. Among others she was the author of writings called the *Freethinker's Text-Book*, the *Gospel of Atheism*, and the *Fruits of Christianity*.

On the 18th of June, 1877, Mrs. *Besant* and Mr. *Bradlaugh* were indicted for publishing an obscene pamphlet called *Fruits of Philosophy*, in which certain checks upon the increase of population were described and recommended. The jury found that the book was calculated to deprave the public morals, but they exonerated the Defendants from any corrupt motives in publishing it. The Defendants afterwards moved the Queen's Bench Division in arrest of judgment on the ground that the indictment did not set out the passages which were charged as being obscene, and the judgment was eventually set aside on that ground (1).

No complaint was made against Mrs. *Besant* for any immoral conduct apart from the publication of those works and the propagation of those opinions, nor for any want of care of the infant Petitioner; but she did not give her, and refused to allow her to receive, any religious teaching.

The petition was heard before the Master of the Rolls on the 18th of May, 1878.

Ince, Q.C., and *Bardswell*, for the Petitioners.

(1) *Reg.* v. *Bradlaugh*, 2 Q. B. D. 569; 3 Q. B. D. 607.

C. A. 1879 *In re* BESANT.

Mrs. *Besant* appeared in person.

W. W. Cooper, for the trustees.

JESSEL, M.R.:—

This is an unpleasant and a painful case, as are many similar cases which come before me. I should not have needed to make that remark now if this case had been argued in Chambers, as many of these cases are, but this has been argued in open Court. Where a husband and wife quarrel and separate it is always a misfortune for the children. It is very difficult to say which is the greater misfortune, to separate the children to the extent of giving the care of the boys to the father and the care of the girls to the mother, which makes them often utter strangers to each other in their future life, or to hand them over to a third person, or to deprive one parent of the care of any of the children. I make that remark because it has some bearing on the present case.

The present petition is a petition presented by the father of a little girl eight years of age, a beneficed clergyman of the Church of *England*, the Rev. *F. Besant*, and I find this petition is presented by him in the character of next friend of the child in question. What I am asked to do is to order that the care of the infant may be taken away from the mother, and the legal custody of the child given to the father.

It seems that in the year 1873 Mr. and Mrs. *Besant*, who had then been married about five years, agreed to separate. What the cause of the unhappy differences between them was is not now material to inquire into or consider. They had at that time two children, a boy and a girl, both young, and it was arranged that the boy should be taken care of by the father, and the girl by the mother. That arrangement was carried out by a formal deed executed by both parties, which deed, by virtue of the statute 36 & 37 Vict. c. 12, was a legal deed at the time it was executed, that statute having been passed on the 24th of April, and the deed being executed or dated on the 25th of October, 1873. The result of the arrangement was, therefore, that the father parted with the custody and control of the little girl in question, and the mother was lawfully entitled to have the custody of the child. This statute

made, no doubt, a very great alteration in the previous law, because the law as it existed at the time of the passing of that statute was that the father could not part with the custody or control of his children, so as to divest or deprive himself of the rights of a guardian. But this statute has in it an important proviso which I must consider, because upon the proper construction and application of it, the decision in this case mainly depends. That proviso says this (sect. 2): "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

Now this agreement between Mr. and Mrs. *Besant* being a valid agreement at the time it was executed, the real question before me is whether I ought to enforce it. And I am not to enforce it unless I shall be of opinion that it will be for the benefit of the infant to enforce it. It is a negative clause. If I merely doubt whether it would be for the benefit of the infant, I am not to enforce it, and in that case the father's rights remain the same as they were before the Act was passed; that is to say, he has a legal right to the custody of the child, and the legal duty to take upon himself the control and direction of the child in its religious and secular education. Therefore the point I have to decide is, whether or not this is really for the benefit of the child. And I must arrive at that conclusion in the ordinary way in which the Court decides all questions of fact, that is, having regard to the evidence brought before the Court and the knowledge of the world which every Judge ought to possess and use in the same way that a good juryman uses it when he comes to a conclusion on questions of fact.

Now that being so, let us consider what is the relative position of the parties. On the one hand we have an English clergyman, the vicar of a parish in *Lincolnshire;* and on the other hand, we have his wife living separate from him. The child is a little girl, and the question is whether it would be for her benefit to let her remain with her mother. If I think it would not be for the benefit of the infant, then I am to take her away.

C. A. 1879 *In re* BESANT. Jessel, M.R.

With regard to the infant, we must first consider how far the child would be benefited by the affection, influence, and conduct of the mother. It is quite plain that if, after separation, a mother having the control of a child took to evil courses, which rendered her an unfit person to have the control and education of the child, it would not be for the benefit of the child to remain with the mother. I had to deal with that state of things in *Carnegie's Case* (1); that was the case of a little boy, not a girl, in which the lady, after the separation, took to immoderate drinking to such an extent as to incapacitate her for considerable periods of the day from exercising any control over herself or her actions. There I thought it was right, notwithstanding that the separation deed contained clauses similar to those in the present case, to take away the custody of the child from the mother and give it the father. I could give many other cases, but I mention this as only one of the illustrations that have arisen, and no doubt many more will arise, since the passing of the Act I have referred to. There are also other points in this case which I must deal with.

First of all, what is the position of the little girl? She is about eight years of age, and it is not pretended in the affidavits or arguments, and I have read the affidavit of the medical man who was selected to visit the child, that she requires a mother's care for her physical education; that is to say, considering the age of the girl, she may live with any one who takes proper care of her. Therefore, in that respect there is no advantage in her remaining with her mother. But there is an advantage in giving her to the care of the father, and that is not an inconsiderable advantage, namely, that she will have the companionship of her little brother. To my mind that would be a very great advantage to a little child, as I said before. As a man of the world, and speaking as a father, I am satisfied that solitary children are not so happy, and not so likely to make good men and women, as children brought up in the society of brothers and sisters in early life. Of course I shall not decide this case upon such a ground as that alone, but that is one of the elements I have to consider in forming my conclusion.

Coming now to the graver aspects of the case, another element in it is this, namely, there are two distinct charges brought against

(1) Not reported.

C. A. 1879 *In re* BESANT. Jessel, M.R.

Mrs. *Besant* which I must deal with. I am glad to say that as far as I can see Mrs. *Besant* has been kind and affectionate in her conduct and behaviour towards the child, and has taken the greatest possible care of her, so far as regards her physical welfare. I have no doubt she entertains that sincere affection for the child which a mother should always feel, and which no merely speculative opinions can materially affect. But, unfortunately, since her separation from her husband, Mrs. *Besant* has taken upon herself not merely to ignore religion, not merely to believe in no religion, but to publish and avow that unbelief, and to become the publisher of pamphlets written by her, and to deliver lectures composed by herself, stating her disbelief in religion altogether, and avowing that she has no belief in the existence of a Providence or a God. She has endeavoured to convince others, by her lectures and by her pamphlets, that the denial of all religion is a right and proper thing to recommend to mankind at large. It is not necessary for me to express any opinion as to the religious convictions of others, or even as to their non-religious convictions; but I must, as a man of the world, consider what effect on a woman's position this course of conduct must lead to. I know, and must know, as a man of the world, that her course of conduct must quite cut her off, practically, not merely from the sympathy of, but from social intercourse with, the great majority of her sex. I do not believe a single clergyman's wife in *England* living with her husband would approve of such conduct or associate with Mrs. *Besant*, and I must take that into consideration in determining what effect it would have upon the child if brought up by a woman of such reputation. But the matter does not stop here. Not only does Mrs. *Besant* entertain those opinions which are reprobated by the great mass of mankind (whether rightly or wrongly I have no business to say, though I of course think rightly), but she carries those speculative opinions into practice as regards the education of the child, and from the moment she does that she brings herself within the lines of the decisions of Lord Chancellors and eminent Judges with reference to the custody of children by persons holding speculative opinions, and in those cases it has been held that before giving the custody of a child to those who entertain such speculative opinions, the Court must consider what effect

C. A. 1879 *In re* BESANT. Jessel, M.R.

infusing those opinions as part of its practical education would have upon the child. That is undoubtedly a matter of the greatest importance. Upon this point there is no conflict of testimony whatever.

Mrs. *Besant* herself says that she prohibited the governess from giving any religious education to the child, and has prevented the child from obtaining any religious education at all. When the child went to school—a day school, as I understand—Mrs. *Besant* prohibited the governess of it from imparting any religious education, in the same way that she had prohibited the former governess, who was a home governess, from giving the child any religious education. It is therefore not only entertaining and publishing these opinions, but she considers it her duty so to educate the child as to prevent her having any religious opinions whatever until she attains a proper age. I have no doubt Mrs. *Besant* is conscientious in her opinions upon all these matters, but I also have a conscientious opinion, and I am bound to give effect to it. I think such a course of education not only reprehensible but detestable, and likely to work utter ruin to the child, and I certainly should upon this ground alone decide that this child ought not to remain another day under the care of the lady.

I am sorry to say that there is another ground, which I should be glad to avoid dealing with if I could. Another accusation against Mrs. *Besant* is this: It is said that in addition to these opinions on the questions as to the existence of a Deity and other speculative subjects, Mrs. *Besant* has been guilty of immoral conduct in publishing an immoral or obscene book, or rather pamphlet. Now, I am sorry to say that on my attention being directed to some of the pages of this pamphlet I can entertain no doubt whatever as to its being an obscene publication.

My view is exactly the same as was entertained by the Lord Chief Justice of *England* and a jury on the occasion of the trial of Mr. *Bradlaugh* and Mrs. *Besant* for the publication of this book, at which trial they were convicted. And although that conviction has been set aside on a technical point, a flaw in the indictment, no Judge, so far as I am aware, has for a moment doubted the propriety of that conviction. Besides that, it has also been condemned by a magistrate to be destroyed, and that decision has

been confirmed by a Court of Quarter Sessions, a number of magistrates being assembled there. I think my view of the book is, if I may say so, fully confirmed and borne out by these previous decisions; although, even if I entertained a less strong opinion than I do, I ought not to hesitate to express that opinion.

Well, now, what is the result? The result of it is that Mrs. *Besant's* character is to be judged not only by the publication of the book, but by the conviction following from that publication, and one cannot expect modest women to associate with her. She may be a most conscientious person—that is to say, she may believe that all she has done was done by her for the purpose of doing good. I am not unwilling to admit that, and to credit her with good intentions, but if she has adopted a course which is reprobated by a vast majority of mankind, and in fact by the criminal law of this country, I do not think I should be right in saying that it would be beneficial for any young girl to be brought up by such a woman, and I think I should be guilty of a dereliction of duty if I allowed a young girl to be so brought up and educated in that way.

On this ground also, I think the order asked for by the Petitioners should be made, and I therefore make an order that the custody of the infant be forthwith given up to the father, and that the costs of the Petitioners and of the trustees be paid out of the fund in Court.

From this order Mrs. *Besant* appealed. The appeal came on to be heard on the 24th of March, 1879

Mrs. *Besant*, in person:—

My first objection to the petition is that Mr. *Besant*, my husband, is joined as a Petitioner. He entered into a covenant in the separation deed that I should have the custody of the girl for eleven months in the year, and he is estopped from now asking the Court to take her from me. Having delegated his authority to me over the child, he cannot now repudiate his own act.

[JAMES, L.J., referred to *Lyons* v. *Blenkin* (1).]

(1) Jac. 245.

C. A. 1879 *In re* BESANT.

I stand in my husband's place, and am the child's legal guardian. Therefore the Court can only remove her from my custody upon the same grounds which would justify the Court in removing a child from the care of its father. No such grounds are shewn in this petition. My refusal to give religious teaching to the child is no sufficient ground. By the *Elementary Education Act* (33 & 34 Vict. c. 75) the Legislature has not only excused the teachers of public elementary schools from giving, but has forbidden them to give, religious instruction. Mr. *John Stuart Mill* was brought up in this manner by his father, and no injury to his character resulted. It cannot therefore be held a necessary part of education. My holding and advocating views hostile to Christianity is no sufficient ground. Every subject of this country is free to hold and propagate his own opinions on the subject of religion, and to teach them to his children. There has been no case in which a child has been removed from its father's custody on this ground unless his conduct was also immoral. In *Shelley* v. *Westbrooke* (1) Lord *Eldon's* decision, by which he took the poet *Shelley's* children from him, depended upon the fact that he considered *Shelley's* course of life to be immoral. No such accusation has been made against me. It is indeed alleged against me that I am guilty of immoral conduct in publishing and circulating the pamphlet called the *Fruits of Philosophy*. That work was written by Dr. *Knowlton*, of *Boston*, in the *United States of America*, and had been sold by various persons in *England* without restriction for fifty years. The jury, while finding a verdict of guilty against me for publishing it, coupled their verdict with an expression of opinion that the act had been done with no wrong motive. It is a scientific work, and only contains details which may be found in many medical works, and in fact very much the same things the Government allows to be taught to boys and girls in the physiological classes at *South Kensington*.

The future prospects of the child will not be endangered by her being left in my care. Apart from the question of religious instruction, she will have the best education which can be procured; she will have the companionship of persons of a station in society by no means inferior to that of her father; and her health

(1) Jac. 266, n.

and happiness will be better studied by her mother than by any other person.

I also complain of the judgment of the Master of the Rolls in not allowing me any access at all to the child. On that ground, at all events, this appeal must succeed.

Ince, Q.C., and *Bardswell*, for the Petitioners:—

In *Lyons* v. *Blenkin* (1), the father had abandoned the care of the children and was without the means of adequately supporting them. But we are content to treat this case without reference to the rights of the father, and as if it were solely the petition of the infant. The infant being a ward of Court is entitled to the protection of the Court, and no covenant by the father can deprive her of that right. The 36 & 37 Vict. c. 12, s. 2, provides that the Court shall not enforce an agreement in a separation deed that the mother shall have the custody of an infant, if it shall be of opinion that it will not be for the benefit of the infant to give effect thereto. It is therefore entirely open to the Court to deal with this case as may be best for the infant, without regard to the covenant in the separation deed.

There cannot be a doubt that the future welfare of this child will be prejudiced by her being brought up in association with persons who hold the opinions which her mother professes and advocates—opinions which are looked upon by most people as wrong, and by her own sex as perfectly shocking. If it be necessary, in order to bring the case within *Shelley* v. *Westbrooke* (2), that immoral conduct should be proved as well as opinions tending to immorality, we say that the publication of the *Fruits of Philosophy* was an immoral act.

[They were stopped by the Court.]

Mrs. *Besant*, in reply.

Ince, Q.C.:—

In case the Court should dismiss the appeal, I ask for costs out of the separate estate of Mrs. *Besant*, beyond the security of £20 which has been paid into Court: *Morris* v. *Freeman* (3).

(1) Jac. 245. (2) Jac. 266, n. (3) 3 P. D. 65.

C. A. 1879 — *In re* BESANT.

1879. April 9. JAMES, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Bramwell*, L.JJ.) as follows:—

We have not in this case to consider any question as to the exercise of the power of the Court to deprive a father of the paternal power over his children which the law recognises as of the essence of that family constitution which lies at the foundation of our social organization. We have not to inquire, and we will not discuss, whether the things which are alleged as the grounds for removing the infant ward from the custody or control of the Appellant, her mother, would or would not, if alleged against a father, have afforded sufficient ground, or any ground, for depriving him of his legal power and natural authority. On the other hand, we have not, having regard to the way in which the case has been presented to us on behalf of the Respondent, as based entirely on the question of what is for the infant's good, to consider whether the father is or is not to any extent precluded by his own contract from asking for the assistance of the Court in enforcing such power and authority. The father did by a separation deed, executed subsequently to the Act 36 & 37 Vict. c. 12, for valuable consideration covenant as follows—viz., that, "Except during one month in every year hereinafter provided she, the said *Annie Besant*, may have the said *Mabel Emily Besant* so long as she shall continue an infant, to reside with her, the said *Annie Besant*, or where she shall from time to time direct, and that except as aforesaid she, the said *Annie Besant*, shall have the sole custody and control of the said *Mabel Emily Besant* free from interference or interruption on the part of the said *Frank Besant*." And it may be necessary in some other case, or on some other occasion, to consider and determine what the exact effect is of such a covenant read with the provision of the Act, which says (sect. 2), "No agreement contained in any separation deed made between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother; provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it shall not be for the benefit of the infant or infants to give effect thereto." Indeed, we are informed that as between the husband and wife,

parties to this proceeding, an appeal is likely to be presented to this Court from a decision pronounced in suits brought for determining their rights under the deed of separation. The Appellant has contended that that deed has placed her with respect to the infant in the same position as the father would have been in if he had not executed it, amounting, in fact, to a delegation to her in respect of this infant of his rights and powers. Such a contention is, of course, untenable. No such substitution or delegation is possible by our law. For the purposes of this petition the utmost possible effect that could be given to such a deed would be that, as between the husband and wife, it created a personal disability in the former to exercise or to allege his parental power and authority in removing, or for the purpose of procuring the removal, of the child from her custody and control. But assume—and that is a very strong assumption—that it has in this respect the utmost effect contended for by the Appellant, it only places the ward in the same position as a fatherless child, as the child of a father who is dead or of unsound mind, or otherwise incapacitated. And the Court has, on that assumption, to deal with the ward accordingly. Now there is nothing more clearly established as the settled rule of the Court than this: that it is the duty of the Court to take care that a fatherless ward is brought up in the religion of the father. The only exception is that where an infant ward is of sufficient age and intelligence to have received and formed, and has received and formed, other religious impressions and convictions, strong and apparently fixed, the Court shrinks from the consequences of any attempt on its part to disturb them. But, in view of this possible result, the Court also always takes what care it can to interfere at a sufficiently early period to prevent the ward from receiving such impressions. This consideration would have been sufficient, and is, in our judgment, sufficient alone to determine the question on this petition. It would be impossible for the Court to allow its ward, a Christian child, the child of a Christian father, baptized in the Christian Church, to remain under the guardianship and control of a person who professes and teaches and promulgates the religious, or anti-religious, opinions which the Appellant avows that she professes and intends to persevere in teaching and promulgating. We have nothing to do

C. A. 1879 *In re* BESANT.

with the strength of the conscientious motives by which, as she alleges, she is impelled so to profess, teach, and promulgate. In the absence of the father (the father being assumed to be practically absent) the Court is the real guardian of the infant and must perform its duty to the ward accordingly, and, if necessary, wholly irrespective of the convictions or wishes of the mother and by separating the child from her. It is a plain, imperative duty which the law casts on the Court; it is the plainest right of the infant ward. The same duty and the same right would exist if the child were the child of a Jew, a Parsee, a Mahomedan, or Buddhist.

But, although this is, as we have said, alone sufficient for the determination of the case before us, we are bound to dispose of other matters, the matters on which the judgment of the Court below mainly proceeded. The Appellant has not only taught what she calls matters of speculative opinion in religion, but has published other works which she avers to be in the domain of physiology, of medical science, and political economy, some of which works she herself has written. She avers that she has done this from a desire to promote the happiness of the poorer millions of her fellow-creatures and from a conscientious conviction that she is doing a good work. From the particular nature of the topics which she has chosen to select they may easily be so handled or so published as to be immoral, indecent, and corrupting. One of those publications was the subject of a prosecution and a trial, and after a hearing, in which everything that was alleged, with great ability, by the Appellant and by her co-Defendant was listened to patiently, and after a charge, a careful charge, in many respects favourable to the Defendants, as is shewn by the Appellant's quotations from it to us, the jury found a verdict as follows:—"We are unanimously of opinion that the book in question is calculated to deprave public morals; but, at the same time, we entirely exonerate the Defendants from any corrupt motives in publishing it." The Court, evidently disposed to give every weight to the latter part of the finding, asked the Defendants if they would undertake to discontinue the publication of a work which had been so stigmatized by an impartial jury. This they refused to do, and, accordingly, a severe sentence was passed on

them. It is true that, on a technical objection, the proceedings were quashed, but that is, in our judgment, wholly immaterial to any question before us. We have it before us that the Appellant was found guilty by a jury of publishing a work stigmatized by them as being calculated to deprave public morals, and that she, in spite of that finding, determined to persist, and did persist, in publishing that work. That the jury were right in their finding the Judges of the Court of Queen's Bench had no doubt, and we are constrained to say that we entirely concur. The other works charged are substantially of the same character. It is impossible for us not to feel that the conduct of the Appellant in writing and publishing such works is so repugnant, so abhorrent to the feelings of the great majority of decent Englishmen and Englishwomen, and would be regarded by them with such disgust, not as matters of opinion, but as violations of morality, decency, and womanly propriety, that the future of a girl brought up in association with such a propaganda would be incalculably prejudiced. The Appellant contends that these are unfounded and unwarranted antipathies and prejudices, like those with which rival sects were wont to regard one another. But the Court cannot allow its ward to run the risk of being brought up, or growing up, in opposition to the views of mankind generally as to what is moral, what is decent, what is womanly or proper, merely because her mother differs from those views and hopes that by the efforts of herself and her fellow-propagandists the world will be some day converted. If the ward were allowed to remain with the mother, it is possible, and, perhaps, not improbable, that she would grow up to be the writer and publisher of such works as those before us. From such a possible future the Master of the Rolls thought it his duty to protect her, and we have no hesitation in saying that we entirely concur with him.

Removing the ward from her mother, the proper course was to restore her to her father, against whom there has been in this matter no allegation. With regard to the access of the mother to the child, as to which we have been asked to vary the order, there was nothing in the order as it stands which would prevent an application to the Judge in Chambers for all proper directions in that respect, and he has since given directions, and we

C. A. 1879 *In re* BESANT.

cannot on this hearing give any further or other directions on the subject. We cannot anticipate, and do not anticipate, that he will not exercise his judicial discretion with all consideration for the Appellant. The appeal must be dismissed, with costs to the extent of the security (£20) given by the Appellant.

Solicitors for the Respondent: *Scott, Jarmain, & Trass,* agents for *B. B. Dyer, Boston.*

C. A. 1879 *April* 7.

STIRLING-MAXWELL *v.* CARTWRIGHT.

[1878 M. 28.]

Administration—Jurisdiction—Domicil—Scotch Assets—Limited Administration.

22 Ch D 460-2

Where the Probate Division of the High Court of Justice has granted a general probate of the will of a testator domiciled in *Scotland*, the Chancery Division will make the ordinary decree for the administration of the personal estate of the testator, without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors.

The decision of *Hall*, V.C., affirmed.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

The testator in the action, Sir *William Stirling-Maxwell*, of *Pollok* and *Keir*, was a domiciled Scotchman, and he made, while at *Venice*, a holograph will, which was unattested, but was validly executed according to the law of *Scotland*. By this will he appointed six persons his executors and the guardians of his infant sons, whose mother was dead, and to whom he left nearly the whole of his property. The testator had real estate of great value in *Scotland* and personal estate in that country of the value of £200,000; he had no real estate in *England*, and his personal estate there consisted chiefly of a leasehold house, furniture, and library, in *Grosvenor Street*, and was under £20,000 in value. Confirmation of the will was obtained by the executors in *Scotland*, upon production of which, probate of the will in its ordinary form was granted to them by the Probate Division of the High Court of Justice in *England*, purporting to give them administration of all and singu-

(1) 9 Ch. D. 173.

lar the personal estate and effects of the deceased, the amount thereof being sworn under £20,000.

This action was brought by one of the six executors as the next friend of the infant sons of the testator against the other five executors in order to have his personal estate administered, and proper provisions made for the maintenance and education of the infant Plaintiffs.

The only question in dispute at the hearing of the action was, whether the ordinary judgment for administration of the personal estate should be given, or whether it should be limited, as the Defendants contended it ought to be, to the assets in *England*.

The Vice-Chancellor gave the ordinary administration judgment, and from this decision the Defendants appealed.

Hastings, Q.C., and *Macnaghten*, for the Appellants, contended, as in the Court below, that the judgment ought to be limited to the administration of the assets in *England*. The testator having been domiciled in *Scotland* the English Court had no jurisdiction to deal with anything but the assets locally situate in *England*. They cited *Preston* v. *Melville* (1); *Enohin* v. *Wylie* (2).

Dickinson, Q.C., and *Davenport*, for the Plaintiffs, were not called on.

JAMES, L.J.:—

It appears to me that the decree is entirely in accordance with the established practice of the Court. Decrees have been made constantly in this Court with respect to the assets of an Englishman domiciled abroad, or the assets of a foreigner domiciled abroad, if a person is found here who is accountable for them, or who is within the jurisdiction of the Court. I am not aware that it was ever laid down that there ought to be a limitation of the decree in that respect. You do not always know what the domicil of the deceased was. Very often there is an inquiry as to this in a general administration suit. If the judgment is limited in the way the Defendants contend it should be, you ought first of all to have an inquiry as to the domicil before you institute a suit at all.

(1) 15 Sim. 35; 8 Cl. & F. 1. (2) 10 H. L. C. 1.

C. A. 1879

STIRLING-MAXWELL v. CARTWRIGHT.

No doubt it may be very expedient that in the course of the suit regard should be had to that which was done in *Scotland*, but at present no suit has been instituted in *Scotland*. It is not that the executors apprehend a suit, or anything of that kind, because one of the executors, who has as much right to be heard as any of the others, is himself the party undertaking the proceedings here. If there be any persons in *Scotland* who desire to have an administration there for the purpose of dealing with the Scotch assets, and applying them for the benefit of the persons who are in *Scotland*, and who desire the protection of the Scotch Court, there will be no difficulty in doing so, and this Court, of course, according to the comity of courts, would adopt those proceedings according to the necessities and exigencies of the case. We cannot expect there will be any such suit. Two cases have been referred to which are illustrations of the principle I was suggesting. In *Preston* v. *Melville* (1) there was a Scotch administration of general property, but there happened to be some property in *England* which alone was subject to an English probate. There one of the persons interested, who was not one of the Scotch trustees, took out administration in *England*, and became the legal personal representative in *England*, and said, "I will not hand over that property bodily to the Scotch trustees who ask to have it administered by them under the direction of the Scotch Court. I am in *England;* I desire, so far as necessary for the determination of all questions connected with the English property, that it should be settled here, and the balance handed over to the Scotch trustees." It was the same thing in the Russian case, *Enohin* v. *Wylie* (2). There happened to be property here in *England* which was subject to an English probate granted to the same persons as were the Russian executors. In that suit, certain English subjects having claims upon the property, as they said, and having the assets here in the English funds, and subject to the control of the English Court, asked the Court to prevent the executors from removing that property from this country until their rights were determined. That was decided in their favour. In the present case, if anything had been done in *Scotland*, the Court would have recognised the right of the Scotch Court to deal with the matter.

(1) 15 Sim. 35; 8 Cl. & F. 1. (2) 10 H. L. C. 1.

It is not for us to anticipate that there will be any such proceedings in *Scotland*, and in the absence of that there seems to be no reason why the judgment should not go exactly in the common form.

BAGGALLAY, L.J.:—

I am of the same opinion. My experience is exactly in accordance with that of the Vice-Chancellor, who says that he never saw a decree limited to assets in *England* under such circumstances as these, and that according to his experience the ordinary decree was the proper one.

BRAMWELL, L.J.:—

I concur.

Solicitors: *Freshfields & Newman; Campbell, Reeves, & Hooper.*

Ex parte SWINBANKS. *In re* SHANKS.

Solicitor—Authority to receive Money for Client—Possession of Mortgage Deed executed by Client—Money due from Client to Solicitor and from Solicitor to Mortgagee—Solicitor's Duty as to keeping Diary—Court of Bankruptcy—Jurisdiction—Time for taking Objection—Bankruptcy Act, 1869, *s.* 72.

The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorize him to receive the mortgage money for the client.

If the client has not received the money the mortgagee cannot maintain the validity of the mortgage deed by shewing that he paid the money to the solicitor, unless he can shew that the solicitor was expressly authorized by the client to receive it.

Viney v. *Chaplin* (1) followed.

Barker v. *Greenwood* (2) distinguished.

A solicitor, having been instructed by a client to raise £400 for him by a mortgage of some houses belonging to him, prepared a mortgage of the property to another client, the deed containing a recital that the mortgagor had applied to the mortgagee for a loan of £400, which the mortgagee had agreed to lend on the security of a mortgage of the property. The solicitor induced

(1) 2 De G. & J. 468. (2) 2 Y. & C. Ex. 414.

C. A.
1879
Ex parte SWINBANKS.
In re SHANKS.

the mortgagor to execute the deed, without receiving the money, and afterwards handed it over to the mortgagee as security for a debt of £300, which he (the solicitor) already owed to the mortgagee, telling him that he had himself made advances to the mortgagor. He had in fact advanced the mortgagor £200. The solicitor soon after absconded. It was not shewn that the mortgagor had expressly authorized him to receive the mortgage money:—

Held, by the Court of Appeal, that, even if it was the intention of the mortgagor that the solicitor should be paid the £200 out of the £400 when paid by the mortgagee, the mortgagee was not entitled to hold the mortgage deed as security to the extent of the £200 due from the mortgagor to the solicitor.

The deed was accordingly declared void as against the trustee in bankruptcy of the mortgagor.

An objection to the exercise of the extraordinary jurisdiction conferred on the Court of Bankruptcy by sect. 72 of the *Bankruptcy Act*, 1869, ought to be taken at the earliest opportunity, and it is too late to take such an objection after the objecting party has taken the chance of a decision in his favour on the merits.

But the Court itself may at any time decline *mero motu* to exercise the jurisdiction.

Observations on the duty of a solicitor as to keeping a diary of his transactions with his clients.

Followed by Ct of App 11 Ch D 265

MATTHEW SHANKS, a builder at *South Shields*, filed a liquidation petition in the *Newcastle-on-Tyne* County Court on the 7th of August, 1878, and a trustee of his property was appointed on the 28th of August. On the 7th of December, 1878, the trustee gave notice of his intention to apply to the County Court for an order declaring that an indenture of mortgage, dated the 24th of December, 1877, expressed to be made between *Shanks* of the one part and one *John Robinson* of the other part, and purporting to convey to *Robinson* some land and two houses situate in *Elizabeth Street, South Shields*, the property of *Shanks*, to secure an alleged advance of £400 by *Robinson* to him, was fraudulent and void as against the trustee, and that the property of *Shanks* comprised in it passed to the trustee, free from any incumbrance by *Robinson*.

Shanks had before the date of the mortgage deed agreed to purchase the land from *Edmund Suddards* for £100 for the purpose of building on it, but no conveyance had been executed, and the £100 had not been paid to *Suddards*. The legal estate was outstanding in *Robinson*, who had advanced money to *Suddards* on a

mortgage of the land with other property. The mortgage deed of the 24th of December, 1877, was prepared by *William Henry Bell*, a solicitor at *South Shields*, who acted for both *Shanks* and *Robinson*. *Bell* was also the solicitor to a building society of which *Robinson* was a trustee and a director. The deed contained a recital that *Shanks* had applied to *Robinson* for a loan of £400, and that *Robinson* had agreed to lend the money upon the security of the mortgage. The name of *Bell's* managing clerk appeared as the attesting witness to the signature of *Shanks* to the deed.

In support of the application *Shanks* made an affidavit, in which he said that during the latter part of 1877 he obtained advances from *Bell* to the amount of nearly £200. In November, 1877, *Bell* was desirous of being repaid, and he instructed *Bell* to obtain £400 for him by means of a mortgage of the property in *Elizabeth Street*. Subsequently in December he was pressing *Bell* to obtain him the money, and *Bell* then told him that he thought he would be able to get it from *Robinson*. Before *Shanks* left *Bell's* office a mortgage deed was tendered to him for his signature. He at first hesitated about signing it, but ultimately he signed it on *Bell's* telling him that it was necessary that he should do so in order that the deed might go to *London* to be stamped, and that he should not part with the possession of the deed until he got the money from *Robinson*. *Shanks* afterwards, in December, made frequent applications to *Bell* for the money, who told him that he had not seen *Robinson* and had not got the money, and shewed him the mortgage deed unstamped. On the 5th of January, 1878, *Bell* absconded, and *Shanks* never received the £400. It was afterwards discovered that *Bell* had defrauded many of his clients. He had misappropriated moneys and securities of the building society to the amount of more than £20,000.

Shanks was examined in the County Court on the hearing of the application, and he then stated that the day on which he signed the mortgage deed was either the 1st or the 8th of December, 1877, but he thought it was the 8th. He was confident that the managing clerk was not present when he signed the deed; no one but *Bell* was present. No one then signed his name as a witness to his (*Shanks'*) signature. He said that before he signed the deed *Bell* had advanced him sums amounting to £182, and

C. A. 1879 *Ex parte* SWINBANKS. *In re* SHANKS.

that afterwards he advanced him two further sums of £17 and £2, making altogether an advance of £201. The £2 was advanced on the 29th of December, 1877, and *Shanks* signed a receipt for it as follows: "Received of Mr. *W. H. Bell* the sum of £2 further advanced on premises in *Elizabeth Street, South Shields.*" *Shanks* said that he expected that *Robinson* would have £300 to pay, and that *Bell* would get the £200, and he (*Shanks*) would get the remainder. £100 was to go for the ground, and he only expected to put £100 into his own pocket. He was asked whether he ever expected to get the £400 into his own hands, and he answered, "I expected to be there when the money was paid, and *Bell* would get the £200."

The managing clerk made an affidavit in which he stated that he remembered *Shanks* executing the mortgage deed at the end of December, 1877. He believed that he himself on the same day or the next day caused the deed to be forwarded to *London* to be impressed with an *ad valorem* stamp. *Bell* said to *Shanks*, "Here is the mortgage to Mr. *Robinson*, and *A.* (the managing clerk) will see you sign it." *Bell* left the deed with the clerk, and he then asked *Shanks* what amount the security was for, as there were blanks left in the deed for the consideration. *Shanks* replied £400, and added that the land was £100, that *Bell* had received £300 in bills from *Robinson*, and that he (*Shanks*) had received about £200 from *Bell*, who was going to pay the balance of the £300 as he required it. The managing clerk then took the deed to a copying clerk, who, under his direction, filled up the blanks with £400, and afterwards *Shanks* executed the deed.

Shanks positively denied these statements of the managing clerk.

The managing clerk added that the mortgage deed was handed by *Bell* to *Robinson* about three days after its return from *London* in December, 1877. It appeared from a letter-book kept in *Bell's* office that the deed was sent to *London* to be stamped on the 28th of December, 1877, and the date of the stamp on the deed was the 29th of December, 1877.

The managing clerk was examined upon the hearing of the application in the County Court. He stated that the conveyance of the property by *Suddards* to *Shanks* was executed by *Suddards*

about a fortnight after *Bell* absconded. He said that *Shanks* executed the mortgage deed at the end of December, and not, as *Shanks* stated, on the 1st or the 8th of December. He was asked whether he kept a diary when he was in *Bell's* office. He answered that he did so up to May or June, 1877, but not afterwards, "because we adopted a separate and different system of keeping the sheets. They were kept on daily sheets, and had to go into the bill book. The sheets were destroyed, I believe, after being entered into the bill book." He was asked, "If you had kept the diary up to December your interviews with Mr. *Shanks*, as you say, and with Mr. *Robinson* would appear." He answered, "Yes, if they were important." The Judge asked, "I should have thought that the managing clerk would keep his diary, and out of that diary the clerk would make his bill of costs?" Answer: "That would be the proper course, but we found that the bill clerk was dilatory in his duties, and they got into arrear." The witness was shewn one of the daily sheets, and was asked whether there was any entry in December. He said that there was not, and that he had no entry or memorandum to shew that he attested the mortgage deed or the conveyance to *Shanks*.

Robinson was examined before the Registrar of the County Court before the hearing of the application. He said that he executed the mortgage deed a day or two before the 24th of December, 1877. He admitted that he paid no money when the mortgage deed was handed over to him, but that he had in October, 1877, accepted for the accommodation of *Bell* a bill of exchange for £500, which he had had to pay when it matured at the beginning of November. *Bell* had promised to pay the money in a few days or to give him security. *Bell* paid part of the money and handed over *Shanks'* mortgage deed to him as security for the balance, £300. *Bell* told him that he had already advanced money (though he did not mention the amount) to *Shanks* on the security of the property, and he took *Bell's* word for it. He made no inquiries of *Shanks*, and did not know him, but was satisfied with seeing that he had already executed the deed. He did not know the signature of *Shanks*, but was satisfied with what *Bell* told him. He admitted that he was aware some time before that *Bell* had been misappropriating property belong-

C. A. 1879

Ex parte SWINBANKS. *In re* SHANKS.

ing to the building society. With regard to the other £100 he stated that *Suddards* had previously mortgaged to him some property, including that which he had agreed to sell to *Shanks*, and that on the execution by *Suddards* of the conveyance to *Shanks*, in which *Robinson* himself joined as mortgagee from *Suddards*, *Robinson* allowed *Suddards* in account the £100 purchase-money which *Shanks* had agreed to pay to *Suddards* for the *Elizabeth Street* property, and in that way *Robinson* paid the £100 for *Shanks*. It appeared that the mortgage deed was engrossed on the 30th of November, 1877. The Judge of the County Court made an order declaring the mortgage deed of the 24th of December fraudulent and void as against the trustee, and also declaring that the property of the debtor comprised in the deed passed to the trustee free from any incumbrance or charge whatsoever by *Robinson*, or by any person claiming on his behalf, or under or through him. And His Honour ordered *Robinson* to deliver up the deed to be cancelled.

Robinson appealed to the Chief Judge. The appeal was heard on the 10th of February, 1879.

Winslow, Q.C., and *Creed*, for the Appellant.

Swanston, Q.C., and *Finlay Knight*, for the trustee.

BACON, C.J., held that *Bell* was authorized by *Shanks* to receive the £400 from *Robinson*, and to retain out of it what was due to himself. And his Lordship made an order declaring that the mortgage deed was valid as against the trustee for £301 (*i.e.*, the £201 advanced by *Bell* to *Shanks*, and the £100 allowed by *Robinson* to *Suddards*) and interest.

The trustee appealed. The appeal was heard on the 1st and 2nd of May, 1879.

Swanston, Q.C., and *Finlay Knight*, for the Appellant:—

The mere possession of the mortgage deed executed by *Shanks* did not give *Bell*, as his solicitor, authority to receive the mortgage money: *Viney* v. *Chaplin* (1). *Robinson* would not have been

(1) 2 De G. & J. 468. 4 Jur. N. S. 619.

justified in paying the £400 to *Bell* without an express authority from *Shanks*. No such authority has been proved. The mortgage deed is altogether void, and ought to be delivered up to be cancelled: *Vorley* v. *Cooke* (1); *Ogilvie* v. *Jeaffreson* (2).

Winslow, Q.C., and *Creed*, for *Robinson*:—

Viney v. *Chaplin* does not apply to a case where it is intended that the solicitor shall retain for himself a part of the money. The evidence shews that *Shanks* intended that *Bell* should keep the £201 out of the £400.

In *Barker* v. *Greenwood* (3) it was held that if a man, being indebted to his own agent, authorize that agent to receive money due to him from his debtor, intending that he should thereout pay himself his own debt, he thereby gives the agent an implied authority to receive payment, to the extent at least of his own debt, in any way he may think fit.

[JAMES, L.J.:—There an authority was given to receive the money with the intention that the agent should pay himself out of it.]

At any rate *Robinson* is entitled to hold the deed as a security for the £100 which he in effect paid to *Suddards* for the land, and therefore the deed cannot be set aside entirely. But it ought to stand, as the Chief Judge has held, as a security for the £301.

This is not a case in which the trustee is claiming under the bankruptcy law a better title than the bankrupt himself would have had; he is claiming exactly the same right as the bankrupt himself might have claimed. In such a case the Court of Bankruptcy either has no jurisdiction under sect. 72 of the *Bankruptcy Act*, 1869, or, if it has, it ought not to exercise it, but should leave the parties to their ordinary remedy: *Ex parte Brown* (4).

[JAMES, L.J.:—This objection is taken now for the first time. It is clear the Court has ample jurisdiction if it chooses to exercise it.]

In *Ex parte Dickin* (5) the objection was taken for the first time in the Court of Appeal, and taken by the Court itself.

(1) 1 Giff. 230.
(2) 2 Giff. 353.
(3) 2 Y. & C. Ex. 414.
(4) *Ante*, p. 148.
(5) 8 Ch. D. 377.

C. A.
1879
Ex parte SWINBANKS. *In re* SHANKS.

JAMES, L.J.:—

With regard to the objection to the jurisdiction, it is very likely that if it had been taken in the first instance the Court might have said to the parties, Try the case out before the ordinary tribunals. The power given to the Court of Bankruptcy by sect. 72 is almost without limit, because, as I have said in other cases, the Legislature trusted that Court not to exercise the jurisdiction except in a proper case. But it seems to me that when the objection was not taken in the County Court, nor before the Chief Judge, whose decision was in favour of the present Respondent, it would be monstrous now to throw away all the expense which has been already incurred, and to say to the parties, Fight the case out in the Chancery Division. It seems to me that it is too late now to take the objection, after the Respondent has taken his chance of a decision in his favour in the Court of Bankruptcy.

Upon the merits of the case, it appears to me that, with the exception of something which I shall say presently about the £100 allowed in account to *Suddards*, the order of the County Court Judge was perfectly right. The mortgage deed in question was made between *Shanks* of the one part and *Robinson* of the other part. It contains a recital that *Shanks* has applied to *Robinson* for a loan of £400, and that *Robinson* has agreed to make the loan upon having the repayment of it with interest secured as thereinafter appears. And then it is witnessed that, in consideration of £400 advanced by *Robinson* to *Shanks*, *Shanks* conveys the property to *Robinson* subject to redemption. The whole of that story, as it stands, is a mere fiction of *Bell's*. There never was any application by *Shanks* to *Robinson* to lend him £400, and there never was any agreement by *Robinson* to lend it; there never was any sum of £400, or any part of it, paid by *Robinson* to *Shanks*, or to any person as his agent, by his authority. It appears to me perfectly clear on the evidence that there never was any real mortgage transaction between *Robinson* as lender and *Shanks* as borrower. The way in which the mortgage deed got into *Robinson's* possession was this, according to his own story. He had accepted a bill of exchange for £500 for the accommodation of *Bell*, and had had to pay it at maturity. *Bell* paid him part of the money, and handed over the mortgage deed

to him as security for £300, telling him that he had already made advances to *Shanks*. The mortgage deed thus came into the possession of *Robinson*, and if he had passed it on for value to another person it would probably have created a valid charge on the property as against *Shanks*. But it was handed over to *Robinson* only as security for *Bell's* debt, and *Robinson* himself could never obtain any security by means of it as against *Shanks*. The parchment got into his hands only through a gross breach of duty, almost amounting to embezzlement, on the part of *Bell*. *Bell* induced *Shanks* to execute it by means of an extraordinary story about the necessity of sending it to *London* to be stamped, and he had no right to give it to *Robinson* except on the completion of the mortgage transaction, by means of which the money would have come into the hands of *Shanks*. The deed, therefore, cannot stand for that which it purports to be. But, assuming that it is restored to the trustee as representing *Shanks*, is there anything in the transactions which took place between *Bell* and *Shanks* and between *Bell* and *Robinson* which can entitle *Robinson* to any security upon the property? *Robinson* puts his case thus. He says, "I was a creditor of *Bell* when the deed was executed to the amount of several hundreds of pounds, and at the same time *Shanks* was a debtor to *Bell* for £201, and I am entitled to a security or a charge on the property in respect of the sum which was due from *Shanks* to *Bell*. I have a right to hold the deed as a security to that extent." It is very difficult to see how, when the transaction is impeachable for fraud and dishonesty, when the charge originated under such circumstances, this Court can modify the security which was obtained by *Bell* from *Shanks*, so as to give *Robinson* the charge which he might have had if the transaction had been honestly carried out according to the intention of *Shanks*. If it had been so carried out, no doubt *Robinson* would have got a security. He would have advanced the £400, and out of it £201 would have been retained by *Bell*, or would have been handed back by *Shanks* to *Bell*. But the transaction intended by *Shanks* never has been carried out. *Shanks* never intended to give a security for a past debt due by *Bell* to *Robinson*. That was an entirely different thing from *Shanks* getting the £400, and it seems to me impossible for the Court to make a new bargain for

C. A. 1879

Ex parte SWINBANKS. *In re* SHANKS.

James, L.J.

the parties and give *Robinson* a security for the £201. It is his misfortune that he was dealing with such a dishonest man as *Bell*. But he never advanced any money on the faith of the representations which *Bell* made to him; he simply took any security he could get for the money which *Bell* already owed him, and it appears to me that he is not entitled to any charge upon the property in respect of that. The £100 paid or allowed by *Robinson* to *Suddards* stands, however, in a different position. It cannot in any way make the deed a valid mortgage. But the £100 is a charge on the property independently of the mortgage deed. *Robinson* has got the conveyance of the property to *Shanks*, and beyond all question *Shanks* has never paid for it, and *Robinson* has allowed the £100 in account with *Suddards*. It is quite clear that the conveyance was completed some time after *Bell* absconded. *Robinson* in fact paid the £100 to *Suddards*, and he got the conveyance, and he must retain the benefit he has thus obtained. He is entitled to an equitable charge on the property for the £100. The order of the County Court Judge must therefore stand as to the mortgage deed, but the order must be expressed to be without prejudice to any lien or charge which *Robinson* has on the property in respect of the £100.

In my view of the case it is not necessary to say anything with regard to the evidence of the managing clerk about the conversation which he had with *Shanks*, because, if it is true, it did not amount to anything like an authority to *Bell* to receive the £400 for *Shanks* and hand over the balance to him. The County Court Judge having seen and heard both *Shanks* and the managing clerk, came to the conclusion that he must believe *Shanks* and not the clerk, and I see no reason whatever for dissenting from that conclusion. At any rate, it is impossible to prove an authority to *Bell* to receive the money by means of a conversation as to which *Shanks* swears one way and the clerk the contrary. But it does strike me as a very odd thing that no diary should have been kept of the transactions, and that the entries should have been made only on loose sheets of paper which were capable of being easily destroyed. I trust I shall never hear of such a proceeding in a solicitor's office again. I cannot conceive any honest reason for making these entries on loose sheets, but I can conceive that

there might be very good reasons for concealing the transactions of this absconding solicitor at a time when he was embezzling the moneys of his clients. I think that the managing clerk ought not to have lent himself to any such proceedings.

BRETT, L.J.:—

At the last moment, after the appeal had been argued by two counsel for the Appellant and one for the Respondent, the point was taken that neither the County Court Judge, nor the Chief Judge, nor this Court, had any jurisdiction in the matter; and it was said that several decided cases proved this. It appears to me that the words of sect. 72 are sufficient to give the jurisdiction, and that none of the cases cited have decided that there is no jurisdiction. They only decided that in such a case as this the Court of Bankruptcy would, as a general rule, not exercise the jurisdiction. As neither party, however, raised the objection before, but, on the contrary, they both argued the case fully on its merits, it appears to me that it would be very wrong for us to entertain the objection now. We have, therefore, to decide the case on the law and the facts.

It appears to me that it was a most wholesome decision in *Viney* v. *Chaplin* (1) that the mere fact that a solicitor has in his possession a deed executed by his client does not give him authority to receive for his client the money which is the consideration for the deed. It would have been most dangerous if it had been decided otherwise. That decision is binding upon us, and was, in my opinion, a most righteous decision. Therefore, to entitle *Bell* to receive the mortgage money for *Shanks* from *Robinson*, he must have had express authority from *Shanks* to receive it. It has been argued that the evidence shews that an express authority was given. But it seems to me that, even if any authority was given by *Shanks*, it was not followed. It is said that the evidence of the managing clerk proves that an authority was given. Now it is admitted that *Bell* was a solicitor who was dealing fraudulently with the documents of his clients; in fact, a more disgraceful rogue cannot be conceived. In the course of the

(1) 2 De G. & J. 468.

C. A. 1879

Ex parte SWINBANKS. *In re* SHANKS.

Brett, L.J.

examination of his confidential managing clerk, the clerk was challenged to produce the ordinary diary kept by a solicitor. He said that no diary was kept, but that the transactions were entered only on loose sheets. If such a thing was really done it was because this solicitor's office was full of fraud, and I should look with great suspicion upon the confidential managing clerk. But I do not believe a word of the story, for it is the interest of a solicitor to keep a diary, as it is by means of it that he makes out his charges against his clients. I believe that a diary was kept, and that it has been destroyed, and if so, it is obvious that the managing clerk must have been a party to its destruction, and any evidence given by him ought not to be relied on if it is contradicted. His evidence is contradicted by *Shanks*, and I think the Judge of the County Court was right in disbelieving every word of the clerk's evidence. I should have done so myself. I have great doubt about *Robinson's* own conduct. He accepted, from a man whom he knew to be *Shanks'* solicitor, a deed containing a false recital which he knew was intended to be a mortgage deed; and he took the deed, without advancing any money, in consideration of an accommodation acceptance which he had previously given to *Robinson*, and had been compelled to pay. I look on *Robinson's* evidence with great suspicion. *Bell* was instructed by *Shanks* to obtain £400 for him on a mortgage of the property, and I believe that *Bell* had from the first an idea of misusing the mortgage deed as he had misused the deeds of other clients. He obtained the signature of the deed by *Shanks* by means of an utterly absurd story. He was never expressly authorized by *Shanks* to receive the money, though *Shanks* in his ignorance may have supposed that he had authority to receive it. If *Shanks* ever gave him any authority, it was an authority to receive the whole £400, and to retain a portion of it for himself. But to my mind it is clear that *Shanks* never gave any authority at all. The difference to *Shanks* cannot be overstated. If the £400 had been actually paid by *Robinson*, £100 of it would have gone to meet the purchase-money of the land; £201 would have been kept by *Bell*, and, as between him and *Shanks*, *Bell* would have been paid that sum, and *Shanks* would have received £99 for the purposes for which he wanted it. But, in what actually took place, *Bell* was not paid the

£201, and could still have sued *Shanks* for it, and *Shanks* never received the £99. Therefore the position of *Shanks* was wholly changed, and changed to his detriment, and all this was done in direct fraud of *Shanks*. It is said that the case of *Barker* v. *Greenwood* (1) is an authority contrary to our conclusion, but it appears to me that it does not touch the present case. It is only a decision that if a solicitor has authority to receive money for his client, and to retain part of it for himself, he is not bound to receive in cash that part which he is to retain, but may set it off in account with the person from whom he receives it. Therefore *Barker* v. *Greenwood* does not touch the present case, which must be decided on the authority of *Viney* v. *Chaplin* (2). The result is that *Bell* had no authority to receive the mortgage money, and consequently the mortgage deed ought to be cancelled. I agree with what Lord Justice *James* has said about the £100.

COTTON, L.J.:—

The first question is as to the objection, which has been taken very late, to the jurisdiction of the Court. Now sect. 72 gives the Court the very largest jurisdiction to deal with questions arising in any case of bankruptcy, including such a question as that which is now before us. But the case is one of a kind in which the Court does not usually exercise the jurisdiction, but, on the contrary, declines to do so. If the objection were really to the existence of any jurisdiction, it could never he taken too late; indeed the Court would be bound itself to take the objection as soon as it saw that it had no jurisdiction without the submission of the parties. But when the objection is only this—that the jurisdiction is an extraordinary one and that the Court has a discretion as to its exercise—it ought to be taken at the earliest possible opportunity, and it is not right that a party who is dissatisfied with the opinion of the Court should at the last moment contend that the case is one in which the Court would not under ordinary circumstances exercise its jurisdiction. How does the present case stand? The decision of the County Court Judge was in favour of the present Appellant. The present Respondent

14 Ch D 868

(1) 2 Y. & C. Ex. 414.

(2) 2 De G. & J. 468.

C. A. 1879

Ex parte SWINBANKS. *In re* SHANKS.

Cotton, L.J.

appealed to the Chief Judge, not on the ground of jurisdiction, but upon the ground that the decision was wrong on the law and on the facts, and the Chief Judge reversed the decision. After this decision in his favour, and after the present appeal had been argued until it came to the turn of his junior counsel, in my opinion it was too late for the Respondent to take the objection. Of course the Court itself might at any time say that it thought the case so doubtful that it would leave the parties to their ordinary remedy, but that is not what has happened here. I agree with the other members of the Court that there is no reason why we should decline to exercise our jurisdiction.

This mortgage deed was left by *Shanks* in the possession of *Bell*, as his solicitor, for the purpose of his raising £400 for *Shanks*. How did the deed get into the possession of *Robinson?* He never paid any money for it, and never gave up anything for it; he gave no consideration for it. He took the deed as a security for an antecedent debt of £300 due to him from *Bell*, *Bell* being his solicitor as well as the solicitor of *Shanks*, and he knowing that *Bell* had already been dealing improperly towards some of his clients. It is not necessary to go into the question whether *Robinson* had notice through *Bell*, as his solicitor, of the fact that *Shanks* had not received the £400, for he took the deed, which purports to be a mortgage to secure £400 advanced by him, and he advanced no money at all. But it is said that he is entitled to stand in the position of *Bell* as a mortgagee for £201. That, however, assumes that *Bell* when he handed over the mortgage deed to *Robinson* was entitled to a charge upon the property. The deed was a mortgage to *Robinson*, not to *Bell*, and did not give *Bell* any security. It is said that he had some security on the estate, but it is for *Robinson* to shew that such a security existed, and he has not done so. And, when he proposed to take a mortgage from *Shanks* to himself, how can he be heard to say that he is the transferee of a charge given by *Shanks* to *Bell?* No doubt *Bell* would have been paid the £201 out of the £400 if it had been actually advanced by *Robinson;* but that would have been because *Bell* was the solicitor of both parties, and not because he had any charge on the property. The receipt given by *Shanks* for the £2 advanced to him by *Bell* on the 29th of December, 1877, cannot

entitle *Robinson* to say that *Bell* had any charge on the estate when he handed over the mortgage deed. Then, as to the £100 allowed by *Robinson* to *Suddards*, that cannot support the mortgage deed or enable *Robinson* to say that he held the deed as security for that sum. When he took the deed he took it only as a security for the £300 which was due to him from *Bell*. The transaction with *Suddards* was at that time incomplete, and *Robinson* is not entitled now to say that, because he afterwards gave *Suddards* the benefit of the £100, he can hold the deed as a mortgage to secure that sum. The £100 was only paid in this way, that, as between himself and *Suddards*, he treated it as paid by *Shanks*. *Robinson* is only entitled to a lien, in the nature of a vendor's lien for unpaid purchase-money, on the property for £100, and not to a security as mortgagee. In that respect the order of the County Court Judge went further than it ought to have gone. It ought only to have declared the mortgage deed null and void, and to have directed it to be delivered up to be cancelled, leaving untouched *Robinson's* lien for the £100.

Solicitors for Appellant: *Hopwood & Sons*, agents for *R. Purvis, South Shields.*

Solicitors for Respondent: *Pitman & Lane*, agents for *C. R. Bell, South Shields.*

Ex parte PAYNE. *In re* CROSS.

Bill of Sale—Act of Bankruptcy—Assignment of whole of Grantor's Property—Consideration—Forbearance to enforce former Bill of Sale of same Property—Protected Transaction—Registration—Growing Crops—Bill of Sale set aside as against Trustee in Bankruptcy of Grantor—Rights of Grantee under subsequent valid Bill of Sale—Practice—Cross Notice of Appeal—Co-Respondents—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 94, 95—*Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 1—*Rules of Court*, 1875, *Order* LVIII., *r.* 6.

The forbearance of the grantee under a bill of sale of the whole of the grantor's property, given for value, to seize the property comprised in it is not, as against the trustee in bankruptcy of the grantor, good consideration for the giving of a new bill of sale in lieu of the first, but the new bill of sale given under such circumstances without any fresh advance to the

C. A.
1879
Ex parte PAYNE.
In re CROSS.

grantor is an act of bankruptcy, and void as against the trustee in bankruptcy of the grantor.

Ex parte Cooper (1) followed.

Ex parte Stevens (2) approved.

A bill of sale of growing crops does not require registration under the *Bills of Sale Act*, 1854.

Brantom v. *Griffits* (3) followed.

On the 2nd of May a farmer executed a bill of sale of his furniture and growing crops, being the whole of his property, to *P.*, the only consideration for it being the forbearance of *P.* to seize the property under a bill of sale given to him four months previously, as he alleged, for value, and not registered. On the 3rd of May the grantor gave a bill of sale of the same property to *C.* in consideration of a present advance of money. *C.* had no notice of *P.'s* bill of sale. Neither of the bills of sale was registered. *C.* took possession of the property on the 20th of August, and *P.* on the 23rd of August. On the 26th of August the grantor filed a liquidation petition, and on the 1st of October he was adjudicated a bankrupt:—

Held, that *P.'s* bill of sale was void as against the trustee in bankruptcy of the grantor as an act of bankruptcy, and that *C.'s* bill of sale, so far as regarded the furniture, was also void as against the trustee for want of registration, notwithstanding the fact that he had no notice of the act of bankruptcy to which the trustee's title related back.

Ex parte Attwater (4) followed.

But, as to the growing crops, *held*, that *C.'s* bill of sale was a protected transaction by virtue of sects. 94 and 95 of the *Bankruptcy Act*, 1869, and was therefore good as against the trustee.

Decision of *Bacon*, C.J., reversed in part.

The fact that a bill of sale is set aside as void against the trustee in bankruptcy of the grantor does not entitle the trustee to stand in the place of the grantee, and thus acquire priority over the grantee under a valid bill of sale subsequently executed by the grantor.

Ex parte Leman (5) followed.

On the application of a trustee in bankruptcy, the Registrar of a County Court declared two bills of sale which the bankrupt had executed void against the trustee. On appeals by the two grantees, the Chief Judge affirmed the decision as to the first bill of sale, but held that the second bill of sale was valid as against the trustee. The first grantee gave notice of appeal, addressed to the trustee and to the second grantee. The trustee gave no original notice of appeal, but served notice on both the grantees that, on the hearing of the first grantee's appeal, he should contend that the decision of the Chief Judge as to the second bill of sale ought to be varied in his favour:—

Held, that this was a good notice under Rules of Court, 1875, Order LVIII., rule 6.

ON the 29th of December, 1877, *John Cross*, a farmer at *Betton*, near *Shrewsbury*, executed to *George Payne*, of *Manchester*, a bill

(1) 10 Ch. D. 313.
(2) Law Rep. 20 Eq. 786.
(3) 1 C. P. D. 349; 2 C. P. D. 212.
(4) 5 Ch. D. 27.
(5) 4 Ch. D. 23.

of sale of his household furniture, farming stock, and other chattels, and of his growing crops, to secure the repayment of £300, and £22 10*s.* premium or bonus. The deed was not registered under the *Bills of Sale Act*, 1854. It included the whole of *Cross's* property.

On the 2nd of May, 1878, *Cross* executed to *Payne* a second bill of sale to the same effect, and to secure the same amount. This deed also comprised the whole of *Cross's* property, and it was not registered. No fresh advance was made to *Cross* upon its execution, and the deed contained no covenant by *Payne* to make any further advance. It was in fact given in substitution for the bill of sale of the 29th of December, 1877, under which *Payne* was then entitled to take possession of the property, but he forbore to do so in consideration of the execution of the second bill of sale.

On the 3rd of May, 1878, *Cross* executed to *A. S. Cochrane* a bill of sale of the same property to secure the repayment of £300 then advanced to him by *Cochrane*, and £75 for interest and expenses. This deed was not registered. At the time of its execution *Cochrane* had no notice of the execution of either of the prior bills of sale. The property remained in the apparent possession of *Cross* until the 20th of August, 1878, when *Cochrane* took possession of it. On the 23rd of August *Payne* took possession. On the 26th of August *Cross* filed a liquidation petition in the *Shrewsbury* County Court, and on the 1st of October he was adjudicated a bankrupt on a petition which alleged the filing of the liquidation petition as an act of bankruptcy. Afterwards the property comprised in the bills of sale was sold by *William Hall*, an auctioneer, acting under the joint instructions of *Payne* and *Cochrane*, and, after paying out of the proceeds rent due to the landlord and tithes and expenses, there remained in the hands of *Hall* a sum of £508 4*s.* 10*d.*, of which £322 8*s.* 6*d.* arose from the sale of the growing crops.

The trustee in the bankruptcy claimed the whole of the £508 4*s.* 10*d.*, alleging that the execution of each of the bills of sale of the 29th of December, 1877, and the 2nd of May, 1878, was an act of bankruptcy, and he applied to the County Court for an order that *Hall* should pay over the £508 4*s.* 10*d.* to him. The Registrar, acting as Judge, held, upon the evidence, that the

C. A. 1879 *Ex parte* PAYNE. *In re* CROSS.

bill of sale of the 29th of December, 1877, was given in respect of a previously existing debt due from the bankrupt to *Payne*, and that no fresh advance was made by *Payne* at the time of its execution, and that the execution of it, as well as the execution of the bill of sale of the 2nd of May, 1878, was an act of bankruptcy. And His Honour declared both the bills of sale of the 2nd and 3rd of May, 1878, to be void as against the trustee, and ordered *Hall* to pay the £508 4*s.* 10*d.* to him.

From this decision both *Payne* and *Cochrane* appealed to the Chief Judge.

Payne by his notice of appeal asked for an order that *Hall* should pay over to him so much of the £508 4*s.* 10*d.* as he might be entitled to under his security.

Cochrane by his notice of appeal asked that *Hall* might be ordered to pay to him £322 8*s.* 6*d.*, the proceeds of the sale of the growing crops.

The appeals were heard on the 10th of February, 1879.

Winslow, Q.C., and *Robson*, for *Cochrane*:—

The taking possession on the 20th of August rendered *Cochrane* a purchaser for value, within the authority of *In re Wright* (1). It is admitted that he had no notice of the act of bankruptcy of the 2nd of May, and even notice of an act of bankruptcy, if the act is not then available for adjudication, will not deprive a purchaser of the protection of sects. 94 and 95: *Ex parte Hoare* (2).

If *Payne's* title is defeated, it does not follow that *Cochrane's* is bad: *Ex parte Leman* (3).

Growing crops are not personal chattels within the *Bills of Sale Act*, 1854: *Brantom* v. *Griffits* (4).

Finlay Knight, for *Payne*:—

As to the growing crops, *Payne* may rely upon either of his bills of sale, that of the 2nd of May, 1878, or that of the 29th of December, 1877, for as want of registration did not invalidate the security as to the growing crops, *Payne* holds a first charge on them sufficient to satisfy his debt.

(1) 3 Ch. D. 70.
(2) Law Rep. 16 Eq. 625.
(3) 4 Ch. D. 23.
(4) 1 C. P. D. 349; 2 C. P. D. 212.

It has not been found that the giving of the bill of sale of December, 1877, was an act of bankruptcy, and *Payne's* evidence is that it was part of the arrangement of May, 1878, that the prior bill of sale should remain in force. Forbearance to sue is of itself, under some circumstances, a valuable consideration.

Having an unchallenged prior security in the bill of sale of December, 1877, *Payne* does not lose his priority, because *Cochrane* was the first to take possession: *Ex parte Allen* (1).

De Gex, Q.C., and *Redman*, for the trustee:—

The decision appealed from was right in all respects. *Cochrane's* appeal is clearly limited to the growing crops. As to the rest, his bill of sale is void as against the trustee for want of registration. As to the growing crops, even although *Cochrane* had no notice of the prior act of bankruptcy, his title is defeated by reason of the relation back of the title of the trustee: *Ex parte Attwater* (2).

As between the two mortgagees, the circumstance that one mortgage was made for a prior advance, the other not, makes no difference. It does not put one mortgagee in a better position than the other. *Ex parte Leman* (3) was very different, the contest there being between a registered and an unregistered bill of sale holder. The result of our argument no doubt is, that *Cochrane*, by taking possession, could not get priority over *Payne*. To that extent we support *Payne's* case. But whether possession did or did not give *Cochrane* priority over *Payne*, it gave him no priority over the trustee: *Ex parte Cohen* (4); *Ex parte Stevens* (5).

As to *Payne*, his security was an assignment of all the bankrupt's property to secure an antecedent debt, and it is unregistered. Such an assignment is not the less an act of bankruptcy because it is also an evasion of the *Bills of Sale Act*.

Winslow, in reply:—

Non-registration did not make the mortgages void: *Ramsden* v. *Lupton* (6). If there had been no bankruptcy *Payne* would have come first, then *Cochrane*. To say that *Cochrane* has no title

(1) Law Rep. 11 Eq. 209.
(2) 5 Ch. D. 27.
(3) 4 Ch. D. 23.
(4) Law Rep. 7 Ch. 20.
(5) Ibid. 20 Eq. 786.
(6) Ibid. 9 Q. B. 17.

C. A. 1879 *Ex parte* PAYNE. *In re* CROSS.

because *Payne* has no title, would be unheard of. Directly the petition was presented the trustee's title related back to the act of bankruptcy; but when we took possession there was a complete conveyance, without notice of the act of bankruptcy.

BACON, C.J.:—

In this case I have been hearing two appeals in one.

In December, 1877, it appears that *Payne* took a bill of sale. He afterwards, in May, 1878, took a second. Clearly the effect of taking that second bill of sale was to abrogate and abolish the first. Then it further appears that the bill of sale of the 2nd of May, 1878, was an assignment of all the bankrupt's property to secure a past debt. That, I need not say, was an act of bankruptcy, and as such was void for all purposes whatsoever—bankruptcy having since happened—and the title of the trustee relates back, as far as *Payne* is concerned, to the execution of that bill of sale. So that neither to the chattels, nor to the growing crops, can *Payne* make any successful claim. Nor can I make any distinction, because growing crops are not within the terms of the *Bills of Sale Act*. The transaction of the 2nd of May, 1878, was wholly invalid and unlawful, *Payne* being as much an actor in it as the bankrupt himself. His case, therefore, may at once be disposed of, and his appeal must be dismissed with costs.

Then comes the case of *Cochrane*. His statement is that he had no notice of the act of bankruptcy of the 2nd of May, 1878. His security included the growing crops, and that growing crops are not obnoxious to the *Bills of Sale Act* of 1854 is quite clear. I do not in the least question the decision that has been referred to on that point. In the recent *Bills of Sale Act* growing crops no doubt are treated in a different manner, but *Brantom* v. *Griffits* (1) is a clear decision that growing crops are not within the Act of 1854. Then there is nothing to impeach *Cochrane's* claim. Before the filing of the petition he took possession under his security; he advertised the things for sale before the 26th of August, when the petition was filed; and then comes in the 95th section—the protection clause as it is termed—which says that no lawful conveyance shall be impeached in consequence of any prior act of

(1) 1 C. P. D. 349; 2 C. P. D. 212.

bankruptcy of which the purchaser had no notice. The only property to which the appeal can have reference are the growing crops, and it cannot be said that they were left in the order and disposition of the bankrupt, with the consent and permission of the true owner, at the commencement of the bankruptcy. In my opinion *Cochrane's* security is a valid security for such of the goods included in it as are not within the *Bills of Sale Act.*

The order of the Court below, so far as it affects *Cochrane,* will be discharged, and he is entitled to an account of what is due to him for principal, interest, and costs, and to have the amount paid to him, with his costs of the appeal and in the Court below, out of the proceeds of sale.

One order of the Chief Judge dismissed *Payne's* appeal with costs, and the other ordered that *Hall* should, out of the £508 4*s.* 10*d.*, pay to *Cochrane* the amount due to him in respect of his bill of sale, and should pay the residue to the trustee.

Payne, on the 27th of February, 1879, gave two notices of appeal, one from each of the orders of the Chief Judge. The trustee gave no original notice of appeal, but on the 1st of March, 1879, he served a notice on *Payne* and *Cochrane* that he intended, upon the hearing of such one of *Payne's* appeals as related to the order made by the Chief Judge on *Cochrane's* appeal, to contend that the direction of the Chief Judge should be varied in his (the trustee's) favour.

The appeals were heard on the 8th of May, 1879.

Roxburgh, Q.C., and *Finlay Knight,* for *Payne* :—

So far as regards the growing crops the bill of sale did not require registration: *Brantom* v. *Griffits* (1). To that extent, therefore, it is good as against the trustee, so far as the *Bills of Sale Act* is concerned. And it is not void under the bankruptcy law. Though it is an assignment of the whole of the grantor's property, yet there was in substance a fresh advance made on the 2nd of May, 1878. *Payne* was in a position to seize the property at once under the previous bill of sale of the 29th of December,

(1) 1 C. P. D. 349; 2 C. P. D. 212.

C. A. 1879 *Ex parte* PAYNE. *In re* CROSS.

and his forbearance to do so was good consideration for the new bill of sale. It was equivalent to a payment of the mortgage debt by *Cross* to *Payne*, and a relending of it on a new bill of sale: *Ramsden* v. *Lupton* (1). No doubt *Ex parte Stevens* (2) is an authority to the contrary; but that is a decision of the Chief Judge, and is not binding on this Court. And there the consideration given for the first bill of sale was in part an antecedent debt, and the fresh advance was not of sufficient amount. In the present case the proper conclusion from the evidence is that sufficient consideration was given for the bill of sale of the 29th of December.

[COTTON, L.J.:—In *Ex parte Cooper* (3) it was held that the forbearance of the grantee to enforce a judgment was not sufficient consideration for an assignment of the whole of the grantor's property.]

In that case only a promise was given, the bill of sale was not given till nearly two months afterwards; in the present case the transaction was carried out immediately. The property was actually transferred by the execution of the bill of sale.

De Gex, Q.C., *E. Cooper Willis*, and *Redman*, for the trustee, were not heard.

JAMES, L.J.:—

It appears to me that *Ex parte Stevens* is exactly in point. It is true it is a decision of the same Judge who decided the present case, but there is also the decision of this Court in *Ex parte Cooper* which in substance is not distinguishable from the present case. The only consideration which Mr. *Roxburgh* suggests for the bill of sale is this. He says, "I had a right to seize the goods under my former bill of sale" (which for this purpose I assume to be good), "I did not exercise that right, and therefore I gave consideration for the new bill of sale in not seizing the goods under the other." In *Ex parte Cooper* the grantee said, "I had a right to seize the goods under an execu-

(1) Law Rep. 9 Q. B. 17. (2) Law Rep. 20 Eq. 786.
(3) 10 Ch. D. 313.

tion." The right to seize goods under an execution, and the right to seize them under a former bill of sale, are only in terms different. In substance they are exactly the same thing, and the forbearance to exercise the right to seize under an execution was held not to be a sufficient consideration to support the bill of sale. These devices of renewing bills of sale are merely intended to escape the operation of the *Bills of Sale Act* and the bankruptcy law. In substance this bill of sale is for a past debt and nothing else, it comprises the whole of the grantor's property, and it is therefore void as against the trustee as an act of bankruptcy.

BRETT, L.J.:—

It is admitted by Mr. *Roxburgh* that if the bill of sale of the 2nd of May was given for a past advance, then it was an act of bankruptcy and he must fail. But he says it was not given for a past advance, for that, inasmuch as there was a previous bill of sale, by virtue of which on the 2nd of May the holder of it might have seized the goods, and he did not seize them, but, instead of doing so, took a second bill of sale, the transaction was equivalent to the grantor's handing over the money to the grantee and then taking it back again by way of new advance, and therefore the second bill of sale ought to be held to have been given for a new advance. If there were no authority on the point, I could not adopt that view, because the distinction is this—in the case to which Mr. *Roxburgh* likens the transaction the money would be there, the debtor would have it, and would be in a position to pay off the first bill of sale. If he had the money and was in a position to pay off the first bill of sale, it may be that it would be unnecessary for him to hand it over the table, and then take it back again; but in the actual transaction in the present case the grantor had not the money, and could not get it. He was a debtor who could not pay, and he got further credit by giving the second bill of sale. In the one case you might say there was a new advance, in the other you could not, the position of the debtor being wholly different. I should have thought so even without authority. But there is the case of *Ex parte Cooper* (1). There a bill of sale was given, and it was said that it was not given

(1) 10 Ch. D. 313.

C. A. 1879 *Ex parte* PAYNE. *In re* CROSS.

for a past advance, because a judgment had been obtained by the grantee under which he could have issued execution and seized the property, but instead of his doing so the judgment debtor agreed to give him a bill of sale, and did afterwards give him a bill of sale. The agreement to give the bill of sale, at a time when he could have seized the goods under his judgment by virtue of the execution, was relied upon as shewing that the new bill of sale was, in substance, given for a fresh advance. It was answered, no; it was because the debtor was not in a position to pay and did not pay anything, and he gave the bill of sale only in respect of the judgment debt which he already owed and not for a new advance. It was precisely the same as the present case, except that there was a previous judgment instead of a previous bill of sale. *Ex parte Cooper* (1) was a decision of this Court, and is therefore binding upon us. Then there is *Ex parte Stevens* (2), which was before the Chief Judge, and that is not binding on this Court. There, a previous bill of sale was relied upon under circumstances precisely similar to those of the present case, and the Chief Judge held that the subsequent bill of sale was given, not for a new advance, but for a past debt. Unless we are prepared to overrule that case, it is an authority to which we must have regard. So far from overruling it, I respectfully think it was right, and that this appeal must fail.

COTTON, L.J.:—

It was argued that the bill of sale of the 2nd of May was not an act of bankruptcy, because an adequate consideration or benefit was given to the debtor by the creditor's giving up the right which he then had to seize the property, which was comprised in the prior bill of sale. I need not go through what has been already said, for it seems to me that *Ex parte Cooper* in principle decides the case. Moreover, Mr. *Roxburgh's* argument is based on the assumption that the prior bill of sale was a valid and effectual one. But the Registrar has found as a fact that that prior bill of sale, which also comprised the whole of the grantor's property, was given, not for a present, but for a past advance, and so far as I have seen the evidence, I think that is the right conclusion;

(1) 10 Ch. D. 313. (2) Law Rep. 20 Eq. 786.

and, if the former bill of sale of the whole of the property was for a past advance it also was defective, and could not in any way avail the grantee under the second bill of sale as against the creditors of the grantor. On that ground, also, the foundation of the title of Mr. *Roxburgh's* client fails, and I am of opinion that the appeal cannot be sustained.

JAMES, L.J.:—

I ought to add that I have given my judgment on the assumption that the first bill of sale (and I say this in order that there may be no mistake in other cases) was a valid one, just as in *Ex parte Stevens* (1). I am quite prepared to affirm that decision of the Chief Judge.

BRETT, L.J.:—

My judgment was given upon the same assumption.

De Gex, Q.C.:—Then your Lordships will dismiss the appeal of *Payne* with costs.

COTTON, L.J.:—

I considered that the point which has been discussed was governed by authority, but I thought it right also to say that on the evidence the Registrar's conclusion seemed to me to be right.

Roxburgh, Q.C., and *Finlay Knight*, for *Payne*:—

If *Cochrane* succeeds as against the trustee, *Payne* is entitled to recover the property from *Cochrane*, for it is only by virtue of the *Bills of Sale Act* and the bankruptcy law that *Payne's* security is avoided, and neither of those grounds has any application as between *Payne* and *Cochrane*. As between themselves *Payne* has the better title by reason of his priority in date: *Ex parte Allen* (2). It would be better, therefore, that the case should now be argued as between *Cochrane* and the trustee.

De Gex, Q.C., *E. Cooper Willis*, and *Redman*, for the trustee.

(1) Law Rep. 20 Eq. 786. (2) Law Rep. 11 Eq. 209.

C. A.
1879
Ex parte PAYNE.
In re CROSS.

Winslow, Q.C., and *Robson*, for *Cochrane*:—

In the circumstances of the present case the trustee is not entitled to give a cross notice of appeal under Rules of Court, 1875, Order LVIII., rule 6. That rule only enables a respondent to an appeal to give such a notice to the appellant; it has no application between two co-respondents to a notice of appeal given by a third party. The appeal is as against *Cochrane* a new one, and the notice has been given too late.

[JAMES, L.J.:—It was an accident that the two appeals were heard by the Chief Judge together; *Payne* and *Cochrane* were not necessary parties to each other's appeals.]

De Gex, Q.C., *E. Cooper Willis*, and *Redman*, for the trustee:—

Rule 6 says that if a respondent intends, upon the hearing of the appeal, to contend that the decision of the Court below should be varied, "he shall give notice of such intention to any parties who may be affected by such contention." The words are wide enough to include the present case.

[JAMES, L.J.:—My difficulty is this: Have we jurisdiction to determine any question between *Cochrane* and *Payne?* It is not a question relating to the administration of the bankrupt's estate, or, indeed, a question in bankruptcy at all. If *Payne* has any legal right or equity against *Cochrane* that is not a matter in bankruptcy.]

It is a question of priority. The objection was not taken before the Registrar or before the Chief Judge.

JAMES, L.J.:—You say the money is in the possession of the Court, and the Court ought to determine to whom it shall go, and in the presence of all the three parties the Court has determined that it shall go to *Cochrane?*

De Gex, Q.C.:—Yes, to the extent of his bill of sale.

JAMES, L.J.:—Then *Payne* says the money ought to come to him instead of to *Cochrane*. You are a respondent to that appeal, and you say the money ought to be paid to you. It is a question

of priority and you have given notice in time. I think that will do. We must hear the whole case upon that point.

BRETT, L.J., and COTTON, L.J., concurred.

De Gex, Q.C., *E. Cooper Willis*, and *Redman*, for the trustee:—

So far as the growing crops are concerned the *Bills of Sale Act* does not apply, and *Payne's* deed is set aside as an act of bankruptcy, and therefore void as against the trustee. It is only made void by the Act as against the trustee and the creditors under the bankruptcy; it is good as against *Cochrane*. The trustee, therefore, ought to stand in the place of *Payne* and to have the benefit of his security as against *Cochrane*. Those for whose benefit it is set aside ought to have it, and not a subsequent incumbrancer. *Cracknall* v. *Janson* (1) is a decision in point.

[JAMES, L.J.:—The question there was as to the effect of a second creditor's giving up his security to the trustee.

COTTON, L.J.:—Is there any section in the *Bankruptcy Act* which puts you in the place of *Payne?*]

There is not, but we rely on the general law. *Payne's* deed is perfectly good but for the bankruptcy law; why then should any one have the benefit of the order but those persons as against whom it is set aside? *Ex parte Leman* (2) is distinguishable. There the first bill of sale was void for want of registration under the *Bills of Sale Act*, and the second bill of sale, which was registered, was held to be good as against the trustee. But there the title of the trustee did not relate back to the execution of the first bill of sale as it does in the present case, the execution of *Payne's* bill of sale being an act of bankruptcy.

As to the chattels, other than the growing crops, *Cochrane's* bill of sale is made void against the trustee by the *Bills of Sale Act*, for want of registration, and it is immaterial that *Cochrane* had no notice of the prior act of bankruptcy committed in the execution of *Payne's* bill of sale: *Ex parte Attwater* (3).

[JAMES, L.J.:—So far as the bankruptcy law is concerned I

(1) 6 Ch. D. 735. (2) 4 Ch. D. 23.
(3) 5 Ch. D. 27.

C. A. 1879 *Ex parte* PAYNE. *In re* CROSS.

think it is impossible to distinguish this case from *Ex parte Leman* (1). But what have you to say, Mr. *Winslow*, as to the chattels, and the decision in *Ex parte Attwater*? (2)]

Winslow, Q.C., and *Robson*, for *Cochrane*:—

Ex parte Attwater is distinguishable. There the bill of sale holder took possession after the commission of a secret act of bankruptcy; here *Cochrane's* bill of sale itself was executed without notice of the prior bill of sale to *Payne*. The goods were not *Cochrane's* at the commencement of the bankruptcy; it is the leaving the grantee's goods in the possession of the grantor at the time of his bankruptcy which is an offence against the *Bills of Sale Act*.

[COTTON, L.J.:—Sect. 1 of the *Bills of Sale Act* says, "at or after the time of such bankruptcy." You had twenty-one days within which you might have registered.]

JAMES, L.J.:—

This point does not seem to have been considered by the Chief Judge at all, for there is nothing in his judgment dealing with the distinction as to the chattels. It seems to me utterly impossible to distinguish the case from *Ex parte Attwater*, where the point was considered. That case was argued, I recollect, with great ability and perseverance as to the policy of the law. It was said that it was a cruel case where the grantee had lent the money and the prior act of bankruptcy was kept perfectly secret. But we thought we could not escape from the plain words of the Act, that if a man will take a bill of sale and not register it he is liable to the consequences, one of which is that it is void against the trustee in bankruptcy of the grantor as respects the goods which are in his apparent possession at or after the time of his bankruptcy. That means the time of the commission of an act of bankruptcy which is followed by an adjudication. It was then said that the transaction was protected by sects. 94 and 95 of the *Bankruptcy Act*, and that we should mix up the *Bills of Sale Act* and the *Bankruptcy Act*, so as to protect that which would

(1) 4 Ch. D. 23. (2) 5 Ch. D. 27.

be protected under the bankruptcy law; but we held that we could not. It appears to me that the point is *res judicata*, and it has been decided by an authority which is binding upon us that the chattels belong to the trustee in bankruptcy.

BRETT, L.J.:—

The first point is expressly decided by *Ex parte Leman* (1), and the distinction which has been taken in argument is too refined for anybody to comprehend. The second point is, I think, expressly decided by *Ex parte Attwater* (2).

COTTON, L.J.:—

I think the contention of the trustee must fail on the first point. His contention was that the effect of making void the security of *Payne* is to give him the benefit of that security as against *Cochrane*, the second grantee. In my opinion that cannot be maintained. We have held that *Payne's* assignment was bad, as being an assignment of all the bankrupt's property without any present advance, and therefore an act of bankruptcy. That made the assignment bad; and it had also this effect, that the title of the trustee relates back to the act of bankruptcy. Now that does not vest in the trustee the mortgage title of *Payne*, but it vests in him the property itself, and he takes it free from any subsequent charge by the bankrupt, except so far as that subsequent charge is protected by the *Bankruptcy Act*. But sects. 94 and 95 of the Act do give effect as against the trustee to the transaction with *Cochrane;* and, that being so, though the trustee takes the property by virtue of the relation back of his title to the void security—the act of bankruptcy—he takes it subject to the charge created by the bankrupt in favour of *Cochrane*, that assignment being protected by sect. 94, which makes it a valid charge on that which was, as from the 2nd of May, the property of the trustee. That, therefore, subject to the effect of the *Bills of Sale Act*, disposes of the trustee's contention.

Then the *Bills of Sale Act* applies to the mere chattels; and, in my opinion, the trustee is quite right as to them. We have

(1) 4 Ch. D. 23. (2) 5 Ch. D. 27.

C. A. 1879 *Ex parte* PAYNE. *In re* CROSS.

nothing to do with the effect of the *Bankruptcy Act*, or the relation back of the title of the trustee, as against which, no doubt, sects. 94 and 95 of the *Bankruptcy Act* protect the claim of *Cochrane*. We have simply to deal with the *Bills of Sale Act*, which says that every bill of sale is to be registered within twenty-one days. If it is not registered, then it is void as against the trustee in bankruptcy of the grantor as regards the chattels comprised in it which at or after the time of the bankruptcy, and after the expiration of the period of twenty-one days, are in the apparent possession of the grantor. The words seem to me to point to just such a case as this; they are "at or after the time of such bankruptcy," and the only question is what is the meaning of the "time of such bankruptcy?" Interpretation has been given to those words in *Ex parte Attwater* (1), with which I entirely concur. "The time of such bankruptcy" means the time of the commission of the act of bankruptcy to which the title of the trustee relates back. There is no hardship in this. The person claiming under the bill of sale had twenty-one days within which to register it. He did not do that, and the bill of sale is made void, not because he did not register it before the act of bankruptcy, but because for twenty-one days he did not choose to register it, and left the property in the apparent possession of the bankrupt.

Roxburgh, Q.C., and *Finlay Knight*, for *Payne*:—

Cochrane being entitled to the growing crops as against the trustee, *Payne* has a better right to them than *Cochrane*. There is nothing in the *Bankruptcy Act* to deprive *Payne* of his priority against *Cochrane*.

Winslow, Q.C., and *Robson*, for *Cochrane*, were not heard.

JAMES, L.J.:—

The ground of our decision is that the crops were the trustee's, therefore you did not acquire any title to them; but the *Bankruptcy Act* enabled the bankrupt, whose goods they were not, to make a charge on them in favour of *Cochrane*. We have nothing to do now with any question as between you and *Cochrane*. The

(1) 5 Ch. D. 27.

goods were the trustee's; he never gave you, nor has the Act given you, power to charge his goods in your favour. There is a statutory power given to a bankrupt to charge his trustee's goods in favour of certain persons. *Cochrane* has got the crops simply because he had a dealing with the bankrupt which the statute says shall have the same effect as if the trustee had dealt with him.

C. A. 1879 *Ex parte* PAYNE. *In re* CROSS.

BRETT and COTTON, L.JJ., concurred.

Solicitor for *Payne: W. A. Holcombe*, agent for *T. E. Jones, Manchester.*

Solicitor for *Cochrane*: *J. I. Irving.*

Solicitors for Trustee: *Clarke, Woodcock, & Ryland*, agents for *C. Chandler, Shrewsbury.*

In re MOSELEY'S TRUSTS.

C. A. 1878 M. R. *Jan.* 12. C. A. 1879 *March* 25, 29; *April* 9.

Will—Construction—Remoteness—Gift to a Class consisting of Children and remoter Issue—Gift whether partially or wholly void.

A testator gave a fund in trust for *A.* for life, and after his death for all his children who should attain twenty-one, and the issue of such of them as should die under that age leaving issue, "which issue should afterwards attain the age of twenty-one, or die under that age leaving issue at his, her, or their decease or respective deceases, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living":—

Held (affirming the decision of *Jessel*, M.R.), that the gift to the children could not be severed from the gift to the remoter issue, but the whole gift was void as infringing the rule against perpetuities.

Smith v. *Smith* (1) followed.

Affirmed by H. of L. 5 App. Cas. 714

JOSEPH MOSELEY, by his will dated the 25th of April, 1831, gave and bequeathed all his personal estate to trustees upon trust to convert the same into money, and to hold the produce upon trust as to the sum of £3000, part thereof, to pay the income to his son *William Moseley* during his life, and from his decease the testator declared that the said sum of £3000 should

(1) Law Rep. 5 Ch. 342.

C. A. 1879 *In re* MOSELEY'S TRUSTS.

be upon the like trusts for his children and issue as were thereinbefore declared of the trust money and funds for the benefit of the children of the testator's daughter *Mary Jordan*, and in default of such issue of his son *William*, then in trust for his grandson *Samuel Moseley*, his executors and administrators.

The trusts declared for the benefit of the children of *Mary Jordan* were in the following words: "And from the decease of my said daughter my will is that the sum of £3000, the securities for the same, and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue living at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living."

The testator died on the 27th of May, 1831, and his will was proved on the 26th of August, 1831.

The testator's son *William Moseley* had three children, two of whom died under age and without issue, and one, *Harriet*, attained the age of twenty-one years. She was born in 1838, and was married to *H. Pearks* in April, 1863. *W. Moseley* died on the 20th of September, 1877, and on his death the sum of £3000 was paid into Court under the *Trustees Relief Act*.

The present petition was presented by Mr. and Mrs. *Pearks* and the trustees of her marriage settlement, praying that the whole fund might be paid to them.

Chitty, Q.C., and *W. Barber*, for the Petitioners, relied on *In re Moseley's Trusts* (1), in which Vice-Chancellor *Malins* had pronounced a decision on the same clause.

Waller, Q.C., and *Rawlinson*, for the residuary legatee under the testator's will.

JESSEL, M.R., said that he was bound by the decision of the

(1) Law Rep. 11 Eq. 499.

Court of Appeal in *Smith* v. *Smith* (1), which he had himself followed in *Hale* v. *Hale* (2), in which the decision of the Vice-Chancellor in *In re Moseley's Trusts* (3) had been disapproved, and he therefore must declare that the whole gift after the life interest of *William Moseley* was void for remoteness, and the fund must be paid to the residuary legatee.

From this decision the Petitioners appealed. The appeal came on to be heard on the 25th of March, 1879.

Chitty, Q.C., and *W. Barber*, for the Appellants:—

The decision by Vice-Chancellor *Malins* in *In re Moseley's Trusts* was on the same clause in the will, although the fund was different. That decision has never been reversed. The gift is a gift to a class ascertainable at the death of the tenant for life, namely, the children of the tenant for life. The remoter issue are only substituted in the place of children dying. The minimum amount of each of the shares of the children alive at that time is ascertained, although some may receive accretions from the death of those who subsequently die. In the case of such a gift there is no reason why the shares which vest in the children should be made void by the fact that the substituted gifts to remoter issue are void: *Catlin* v. *Brown* (4). All the authorities were reviewed by Vice-Chancellor *Malins*, and we submit that the reasoning on which his judgment was based is conclusive.

Waller, Q.C., and *Rawlinson*, for the Respondent:—

A similar question to that which arises in the present case has been fully considered by the Court of Appeal in *Smith* v. *Smith*, and recently by the Master of the Rolls in *Hale* v. *Hale*, in both of which cases a different doctrine from that adopted in *In re Moseley's Trusts* has been laid down. The question, therefore, is now concluded by authority. The children and the issue of deceased children are all one class, and they must stand or fall together: *Leake* v. *Robinson* (5); *Seaman* v. *Wood* (6).

Chitty, in reply.

(1) Law Rep. 5 Ch. 342.
(2) 3 Ch. D. 643.
(3) Law Rep. 11 Eq. 499.
(4) 11 Hare, 372.
(5) 2 Mer. 363.
(6) 22 Beav. 591.

C. A. 1879 *In re* MOSELEY'S TRUSTS.

April 9. JAMES, L.J. :—

This case comes before us under these circumstances: There was a decision by Vice-Chancellor *Malins* upon a clause of the will, and a subsequent decision by the Master of the Rolls upon the same clause entirely controverting the decision of the Vice-Chancellor. The Vice-Chancellor's decision is reported in *In re Moseley's Trusts* (1), and I feel bound to say that I entirely go along with the reasoning by which he arrived at his conclusion in that case; and if the matter were a matter upon which I felt myself at liberty to express my own opinion as to what the rule of law is, and as to what the proper application of the rule of law to the circumstances of such a will as this is, I should without any doubt or hesitation have concurred in that conclusion, and I rather think the Master of the Rolls would have done so too from what he said.

But unfortunately for the Appellant, unfortunately for my view of what I think the law might have been, the very same point arose and had to be considered by the same Vice-Chancellor upon a will, reported in a case of *Smith* v. *Smith* (2), which, with every possible wish to distinguish, I have found myself utterly unable to distinguish in any circumstance whatever from the will before us. The Vice-Chancellor having so expressed his view upon exactly the same principle, as is clearly shewn in that case of *Smith* v. *Smith*, that conclusion, that view, and the principle upon which and the reasoning upon which he arrived at it were brought before the Court of Appeal, consisting of Lord *Hatherley* and Lord Justice *Giffard*. The matter was fully argued by counsel, one of whom who argued for the Appellant is now a Lord Justice, and therefore it is impossible to say that there was any case of inadvertence or anything of that kind, and the Court of Appeal did deliberately determine that the view of the Vice-Chancellor was not to be sustained, and did reverse that decision.

The Master of the Rolls felt that the decision of *Smith* v. *Smith* was binding upon him, as it was; and it really is not less binding upon us. It is not for us to say that the decision is erroneous. If we were to do that merely because we entertain different views, however strong, as to what would be the proper legitimate in-

(1) Law Rep. 11 Eq. 499. (2) Law Rep. 5 Ch. 342.

ference from former cases or the application of fixed rules to the particular language of a will, there would be nothing to be considered settled or final in the Court of Appeal, the Judges sitting one day might differ from the Judges who were sitting on a former day, or the Judges sitting in one Division might take different views from those sitting in another, and everything would be open to fresh litigation and fresh dispute. However hard it may be upon a particular suitor that he is not able to avail himself of the personal views of the Court, it is much better that that hardship, if it be a hardship, should be endured by him than that the law should be rendered more uncertain than it is, or litigation more common than it is. The decision of *Smith* v. *Smith* (1) seems one which nothing but the House of Lords can set right if it is wrong or ought to be set right, and we being bound by it must dismiss the appeal with costs.

BAGGALLAY, L.J.:—

I entirely concur with the view that this case cannot be distinguished, as far as any principle of construction is concerned, from that of *Smith* v. *Smith*. I am at the same time bound to say for myself that I agree with the views expressed by Vice-Chancellor *Malins* not only in the case of *In re Moseley's Trusts* (2), but also in the case of *Smith* v. *Smith*, when it was before him, and in the case of *Picken* v. *Matthews* (3), which was before him subsequently.

BRAMWELL, L.J.:—

I also consider that we are bound by the case of *Smith* v. *Smith*, and that it is identical with this. I crave leave also to express a very considerable distrust as to the arguments by which that decision was arrived at.

Solicitors: *R. Wood; Crosse, Sons, & Riley*, agents for *J. Riley, Wolverhampton.*

(1) Law Rep. 5 Ch. 342. (2) Law Rep. 11 Eq. 499.
(3) 10 Ch. D. 264.

C. A.
1879
C. J. B.
Feb. 3.
C. A.
April 24.

Ex parte ROSEVEAR CHINA CLAY COMPANY. *In re* COCK.

Vendor and Purchaser—Stoppage in Transitu—End of Transit—Delivery to Purchaser—Contract to deliver Goods free on board Ship to be named by Purchaser—Non-communication of ultimate Destination to Vendor.

13 Ch D 631
11 QBD 359
362-7

Delivery of goods by the vendor to a carrier, even though the carrier be nominated and hired by the purchaser, is only constructive, not actual delivery to the purchaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts.

Till the goods are in the actual possession of the purchaser the transit is not at an end, and it makes no difference that their ultimate destination has not been communicated by the purchaser to the vendor.

A contract was entered into for the sale of some china clay to be delivered free on board at a specified port, and to be paid for by an acceptance of the purchaser. Afterwards the purchaser chartered a ship and gave notice to the vendors, who then delivered the clay on board the specified ship at the port agreed upon. The destination of the clay had not been communicated to the vendors. Before the ship left the harbour the vendors heard of the insolvency of the purchaser, and gave notice to the master of the ship to stop the clay *in transitu*. No bill of lading had been signed, nor had the purchaser given any acceptance for the price of the clay:—

Held, by the Chief Judge, that so soon as the clay was delivered on board the ship the transit was at an end, and the vendors had no right afterwards to stop the clay *in transitu*:—

Held, by the Court of Appeal, that, the clay being in the possession of the master of the ship only as carrier, the transit was not at an end, and the notice to stop was given in time.

DAVID COCK was a china clay merchant at *Roche*, near *St. Austell*. On the 20th of November, 1877, he wrote to the *Rosevear China Clay Company*, whose works were at *Roche*, but whose office was at *Cardiff*, as follows:—

"Your favour respecting china clay to hand. I have this morning been on the works and taken several samples of what is now in stock. I regret very much to assert that what appears to me to have been put in the clay by way of adulteration will prevent me from purchasing. It might and probably would be ruinous to all my connection. There are about 100 tons of the old stock which has not been so treated, and which I would

purchase at 15*s.* per ton, f. o. b. *Fowey*, payment to be by four months' acceptance from date of bill of lading. Same to be shipped during this month, or, if not, bill to date from 1st December. Waiting favour of your reply,

"Yours truly,
(Signed) "*David Cock.*"

On the 27th of November Mr. *Carr*, the company's secretary, replied as follows:—

"We now offer you the balance old *Rosevear* make, 80 to 100 tons, at 15*s.* per ton f. o. b. *Par* or *Fowey*. 4 months' draft dated from 1st December whether shipped or not. Please say if you confirm this."

On the 30th of November *Cock* replied as follows:—

"I am in receipt of your favour of 27th November, accepting my offer for the old stock of china clay at *Rosevear*, which I now confirm."

On the 1st of December Mr. *Carr* replied as follows:—

"I am in receipt of yours of 30th ult., which is two days over return of post. This delay of your confirmation of the purchase has left the matter open for others. But, as we have not definitely closed, if you are prepared to have the clay offered you taken on board within fourteen days from the date of my offer, and accept our draft from 1st December at four months next, we will withdraw from confirming sale to another party, but you must reply here definitely 4th inst., or the matter falls through."

On the 12th of December *Cock* replied:—

"I have a vessel of 215 tons which will load at *Fowey* on Friday next, so now I can take your 100 tons of *Rosevear* clay upon your terms as per your last letter. Let me know not later than Friday morning if I am to have the clay or not."

On the 13th of December a clerk of the company replied:—

"In reply to yours of 12th inst., I beg to say, in the absence of Mr. *Carr*, who is away from home, we will sell you the 80 to 100 tons china clay (old *Rosevear* make) as per conditions mentioned in Mr. *Carr's* letters to you of Nov. 27 and Dec. 1. I have

C. A. 1879

Ex parte Rosevear China Clay Company. *In re* Cock.

instructed Captain *Dyer* by this post to send the same to *Fowey* at once."

On the 27th of December Mr. *Carr* wrote to *Cock*:—

"Mr. *Dyer* has handed account to day by letter which makes 108 tons 2 qrs. 2 cwt. clay as shipped for your account, value £81 1*s.* 10*d.* There is an old balance due to us of £11 7*s.* 8*d.* Do you wish this added to the draft £81 1*s.* 10*d.*? If so, I have no objection, and will send draft for your acceptance in a day or two."

Cock had on the 5th of December entered into a verbal agreement to charter a ship, called the *Forester*, to call at *Fowey*, to convey the clay for him, with other clay, to *Glasgow*, consigned to an agent there for sale. No charterparty was signed. On the 29th of December the company delivered 100 tons of the clay on board the *Forester* at *Fowey*. No bill of lading was signed. *Cock* did not reply to *Carr's* letter of the 27th of December. He was in fact insolvent, and had committed an act of bankruptcy on the 24th of December by absconding. On the 31st of December the company, having heard that he was insolvent, gave notice to the master of the *Forester*, which was still in *Fowey* harbour, to stop the clay *in transitu*. The master afterwards signed a bill of lading in favour of the company, and by their directions the clay was taken to *Runcorn* instead of to *Glasgow*, and was there sold on their account. *Cock* was ultimately adjudicated a bankrupt in the *Truro* County Court. The trustee in the bankruptcy claimed the value of the clay, on the ground that the transit was at an end when it was shipped on board the *Forester*, and that therefore the notice to stop *in transitu* came too late. The trustee applied to the County Court for an order that the company should pay over to him the invoice price of the clay. On the hearing of the application the bankrupt was examined, and said, "I was in the habit of buying and sending clay all over the country. I did not inform the *Rosevear Company* of the destination of the clay. I never used to reveal the ultimate destination of cargoes. I communicated the name of the vessel to the vendors on the 12th of December." The invoice of the clay and the bill of exchange for acceptance were sent through

the post by *Carr* to *Cock* on the 29th of December, but the bill was never accepted.

The Judge of the County Court was of opinion that it was the intention of both the parties that the property in the clay should not pass to the purchaser until the bill of exchange for the price had been accepted by him. But, even if the property did pass, His Honour was of opinion that the clay never came into the possession of the bankrupt, that the *transitus* was not at an end when it was placed on board the ship, and that consequently the company had a right to stop *in transitu*, which right they had effectually exercised. His Honour, therefore, refused the trustee's application.

The trustee appealed to the Chief Judge. The appeal was heard on the 3rd of February, 1879.

De Gex, Q.C., and *Northmore Lawrence*, for the Appellant:—

There was no right to stop *in transitu*. The transit was at an end when the clay was placed on board the ship in *Fowey* harbour; that was the end of the transit provided for by the contract: *Valpy* v. *Gibson* (1); *Ex parte Gibbes* (2). It makes no difference that the vessel did not belong to the purchaser. The County Court Judge relied upon *Berndtson* v. *Strang* (3), *Bloxam* v. *Sanders* (4), and *Mirabita* v. *Imperial Ottoman Bank* (5); but those cases are all distinguishable from the present.

E. C. Willis, for the vendors:—

The clay has never got into the possession of the purchaser, or of an agent for him. *Ex parte Gibbes* does not apply. If we had procured bills of lading to our order, and had indorsed them to the purchaser, and he had obtained possession of the goods by virtue of them, then *Ex parte Gibbes* would apply. The conduct of the parties is consistent with the view that they did not intend the purchaser to have any right to the possession of the goods till they had been paid for. On that question *Bloxam* v. *Sanders* is in point. The contract does not say that the goods are to be

(1) 4 C. B. 837.
(2) 1 Ch. D. 101.
(3) Law Rep. 4 Eq. 481; Ibid. 3 Ch. 588.
(4) 4 B. & C. 941.
(5) 3 Ex. D. 164.

C. A. 1879

Ex parte ROSEVEAR CHINA CLAY COMPANY. *In re* COCK.

delivered on board a ship selected by the purchaser, but simply that they are to be delivered free on board at *Fowey;* it is not meant that that shall be the final delivery to the purchaser. A further *transitus* was contemplated. No bill of lading having been signed, so as to make the goods deliverable to any one, the vendors retained a *jus disponendi: Ogg* v. *Shuter* (1). *Berndtson* v. *Strang* (2) is very like the present case. In *Valpy* v. *Gibson* (3) the purchaser had exercised a definite act of ownership over the goods. Here the purchaser took no possession himself, and, under the circumstances, the captain was not his agent to take possession.

BACON, C.J.:—

I cannot see what the bill of lading has to do with this question. No doubt the vendors might, if they had thought fit, have taken a bill of lading, which would have secured, not the possession of, but a right to, the property mentioned in the bill of lading; but they did not. Their omission to do so cannot be used in their favour.

The transaction is as plain a one as was ever stated. A man wants to buy china clay, a heavy commodity, a thing which he cannot carry in his own waggons, and does not mean to do so, but he tells the company that he will get a ship to transport this clay which he buys of them. He afterwards gives them the name of the ship, and directs them to deliver the clay which he has bought on board that ship. If it had been a warehouse instead of a ship, could there be any doubt that after the clay had been carried to the warehouse the *transitus* would have been at an end? I have no doubt that the *transitus*, such as it was, ended when the clay arrived upon the quay at *Fowey* and was put into the ship *Forester*, which the bankrupt had hired for the very purpose of carrying it. *Valpy* v. *Gibson* is directly in point on the part of the case which I am now considering. There there was that which was a little more remarkable, and which probably gave rise to some argument. The vessel in which the goods were to be shipped was destined for *Valparaiso*, and the vendors of the goods wanted some patterns or cards of theirs to be sent along with the goods, and, knowing well enough that the ship was going to *Valparaiso*,

(1) 1 C. P. D. 47.

(2) Law Rep. 4 Eq. 481; Ibid. 3 Ch. 588.

(3) 4 C. B. 837.

they gave a direction to that effect when they delivered the goods. The Court decided that, when the goods were delivered upon the ship, which had been hired for the purpose of transport by the purchaser, there was an end of the transit. Delivery "free on board" only means "The price shall be that which we stipulate for, and you shall not have to pay for the waggons or carts necessary to carry the clay from the place where it is dug; we will bear all those charges and put it free on board the ship, the name of which you are to furnish." I cannot think that any question arises. The fact that the bill of exchange had not been accepted does not alter the case in the slightest degree. On the 29th of December the china clay, which had been bought and sold, was by the vendors placed on board the ship; they never thought of taking a bill of lading, or of retaining any right over it, but they delivered it to the man who had bought it of them. There is no doubt upon the facts of the case, and there can be no doubt whatever about the law. There was no transit, except from the quarry to the ship's side; the transit was ended so soon as the clay was on board the ship, and the right to stop it was therefore entirely gone. None of the cases which have been referred to give any kind of colour to the claim raised on the part of the vendors to have this clay treated as still belonging to them, although they had delivered it free on board in the manner and at the price stipulated for in the contract between the parties. However, the learned Judge of the County Court took a very different view of the subject. He seems to have bestowed a great deal of attention upon it, and to have considered many cases, the bearing of which on the question before me I have not been able to perceive; but, as he gave a very deliberate and considered judgment, which is entitled to all respect, and as, moreover, he invited the parties to take the case up to the highest Court, I am content that it should go there. But I should be sorry if it went with any expression of doubt on my part. I am clear that this is a case in which the vendor's right of stoppage *in transitu* ceased to exist the moment the clay was put on board the ship.

From this decision the *Rosevear Company* appealed. The appeal was heard on the 24th of April, 1879.

C. A.
1879
Ex parte ROSEVEAR CHINA CLAY COMPANY. *In re* COCK.

Winslow, Q.C., and *E. C. Willis*, for the Appellants:—

In the ordinary course of things the company would have applied to the master of the ship for a bill of lading, and they would have taken it to their own order. They would then have sent it to *Cock* with the bill of exchange for his acceptance. He could not have retained the bill of lading without accepting the bill of exchange; if he had done so, no property in the goods would have passed to him: *Shepherd* v. *Harrison* (1). We cannot be in a worse position because no bill of lading was signed. Therefore the property in the clay never passed to *Cock*.

[BRETT, L.J.:—If things had gone on in the proper course the company would have no right to the bill of lading. They were to deliver free on board to *Cock*.

JAMES, L.J.:—What privity was there between the company and the master of the ship? The bargain to charter the ship was made between *Cock* and the shipowner.]

Still the shippers of the goods would be entitled to have the bill of lading made out to them: *Craven* v. *Ryder* (2); *Abbott* on Shipping (3).

[BRETT, L.J.:—In *Craven* v. *Ryder* the ship was either a general one, or it was chartered by the vendor.]

In *Turner* v. *Trustees of the Liverpool Docks* (4) it was held that the property in goods did not pass to the purchaser, though they were delivered on board his own ship, because by the terms of the bill of lading the vendors reserved to themselves a *jus disponendi*, which the master acknowledged by signing the bill of lading making the goods deliverable to their order or assigns.

[BRETT, L.J.:—In that case the decision was that, if the goods had been delivered on board the purchaser's own ship without any restrictions, that would have been a delivery to the purchaser. But the master had assented to the vendor's restrictions. In the present case, the question is whether there was any intention when the clay was delivered on board the ship to take a bill of lading to the vendors.]

(1) Law Rep. 5 H. L. 116.
(2) 6 Taunt. 433.
(3) 11th Ed. p. 279.
(4) 6 Ex. 543.

It cannot be assumed that there would have been an intention to deliver to the purchaser's order when he had not accepted the bill of exchange; the inference would be the other way.

But, at any rate, whether the property passed to *Cock* or not, the right of stoppage *in transitu* remained. The transit was not over when the clay was put on board in *Fowey* harbour; it would not have been over until the clay had been delivered to *Cock's* agent at *Glasgow*. Delivery on a purchaser's own ship is no doubt delivery to him, but when he has only chartered a ship to carry the goods for him, the master of the ship is not his agent or servant, and the goods are in the master's possession only as carrier, and so long as the possession is of that character the vendor's right to stop *in transitu* continues: *Berndtson* v. *Strang* (1); *Gibson* v. *Carruthers* (2); *Benjamin* on Sales (3).

Northmore Lawrence (*De Gex*, Q.C., with him), for the trustee:—

The vendors might have reserved their rights if they had chosen to do so, but they did not. The contract was to deliver free on board at *Fowey*, and it was fulfilled when the clay was delivered on board the ship on the 29th of December. Then the transit came to an end. The fact that no charterparty had been executed makes no difference. If the ship had been the purchaser's own it is clear that delivery on board would have been delivery to him, and the transit would then have been at an end: *Schotsmans* v. *Lancashire and Yorkshire Railway Company* (4). What difference can it make that the ship is only chartered by the purchaser? If *Cock* had gone to the master and asked for the clay, the master must have given it up to him, subject only to his lien for the freight, with which the vendors had nothing to do. It is for this purpose the same thing as if the ship had been *Cock's* own. The fact that there is to be a subsequent transit prescribed by the purchaser does not prevent there being a complete delivery by the vendor to the purchaser: *Valpy* v. *Gibson* (5).

[JAMES, L.J.:—There the goods were delivered by a carrier to an agent of the purchaser.]

(1) Law Rep. 3 Ch. 588, 590.
(2) 8 M. & W. 321, 328.
(3) 2nd Ed. p. 698.
(4) Law Rep. 2 Ch. 332.
(5) 4 C. B. 837.

C. A. 1879 *Ex parte* Rosevear China Clay Company. *In re* Cock.

If the transit prescribed by the vendor is at an end his right to stop *in transitu* is gone: *Ex parte Gibbes* (1). Here the *Forester* was the destination of the clay prescribed by the company; they knew nothing of the further destination. That distinguishes the case from *Berndtson* v. *Strang* (2), and other cases like it, in which the ultimate destination of the goods was communicated to the vendor when the contract for sale was entered into. In such cases the vendor has the transit to the ultimate destination in his contemplation, and delivers to the carrier as carrier. It is clear that the property in the clay had passed to the purchaser.

James, L.J.:—

11 QBD 366-1-2

With all respect for the decision of the Chief Judge, I am of opinion that this case cannot be distinguished from the authorities which have been referred to, in particular that of *Berndtson* v. *Strang*. The authorities shew that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right the goods must be in the hands of the purchaser or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary. It is admitted that if it had been mentioned in the original contract for sale that the goods were to be carried to *Glasgow* the present case could not have been distinguished from *Berndtson* v. *Strang*, but it is said that the fact that no ultimate destination was mentioned affords a distinction. It seems to me, however, that the mere fact that the port of destination was left uncertain, or was changed after the contract for sale, can make no difference. The principle is this—that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier. I am of opinion that in the present case, although the vendors' liability was at an end when they had delivered the clay on board the ship, which indeed is the case in most instances

(1) 1 Ch. D. 101. (2) Law Rep. 3 Ch. 588.

of stoppage *in transitu*, that did not deprive them of the right to stop *in transitu* so long as the clay was in the possession of the master of the ship as a carrier. To use the language of Lord *Cranworth* (then Baron *Rolfe*), in *Gibson* v. *Carruthers* (1), "I consider it to be of the very essence of that doctrine, that during the *transitus* the goods should be in the custody of some third person, intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession," and that language was adopted by Vice-Chancellor *Wood*, and by Lord *Cairns* in *Berndtson* v. *Strang* (2). The clay in the present case was delivered to a third person intermediate between the vendors and the purchaser, and therefore the vendors still had a right of stoppage *in transitu*.

BRETT, L.J.:—

It seems to me that there was a binding contract between the vendors and the purchaser, though by it alone the property in the clay did not pass to the purchaser. But, as soon as the clay was appropriated by the vendors to this contract, and was placed on board the ship, the property in it passed to the purchaser, and at the same time, as between the vendor and the purchaser, there was a delivery of the clay to the latter. But it was a constructive, not an actual delivery. If the contract had been to deliver to the purchaser at *Fowey*, and the clay had been there delivered to him or to his agent, and he or his agent had then shipped it, I should have thought that after that there would have been no transit. But the contract was to deliver at *Fowey*, on board a ship, and to deliver free on board, that is, the vendors undertook the delivery of the goods. The ship was to be chartered by the purchaser, and he must charter the ship to carry the clay to some port. The distinction taken by Mr. *Northmore Lawrence* is an ingenious one, but it seems to me that it can make no difference whether the destination of the goods is communicated to the purchaser at the time of the contract for sale, or whether the destination is to be named after the contract but before the shipment. Here the purchaser entered into an agreement with the owner of the ship that the ship should take the clay to *Glasgow*, and the

(1) 8 M. & W. 321, 328. (2) Law Rep. 4 Eq. 481; Ibid. 3 Ch. 588, 590.

C. A. 1879

Ex parte Rosevear China Clay Company. *In re* Cock.

vendors were bound to put the clay on board that ship to be carried to *Glasgow*. It was not the purchaser's own ship, but that of the shipowner, and the clay when delivered on board was to be carried to *Glasgow*. The question is whether the transit was at an end before the arrival of the ship at *Glasgow?* It seems to me that several decided cases shew that it was not. In *James* v. *Griffin* (1) Baron *Parke* laid down the law thus (2): "Of the law on this subject, to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right, if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession." The distinction there taken is between a constructive and an actual delivery to the purchaser, and he says that if there is only a constructive delivery to the purchaser the transit is not over until the goods have been actually delivered to him or his agent.

Then, in *Berndtson* v. *Strang* (3), the test put by Lord *Cairns* is, whether the goods have been delivered only to a carrier, although he may have been named by the purchaser. There the ship had been chartered by the purchaser, and therefore, when the goods were placed on board there was a constructive delivery to him. Yet, because the goods were in the hands of the shipowner as carrier, it was held that the transit was not over until that carriage was over. So, too, in *Smith's* Leading Cases, in the notes to *Lickbarrow* v. *Mason* (4), it is said: "The rule to be collected from all the cases is, that the goods are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee."

In the present case the clay was placed on board the ship for the purpose of being carried to *Glasgow;* it was in the actual

(1) 2 M. & W. 623.
(2) Ibid. 632.
(3) Law Rep. 3 Ch. 588.
(4) 7th Ed. vol. i. p. 818.

possession of the shipowner, and only in the constructive possession of the purchaser. Therefore the right of stoppage *in transitu* existed. If the purchaser had been the owner of the ship, the vendors would have had no such right, unless they had reserved it by express stipulation. But, in the actual state of things, I think that, both on principle and on the authorities, the transit was not over and the right to stop *in transitu* remained.

Cotton, L.J. :—

I am of the same opinion. Assuming that there was a binding contract for the sale of the clay, I think that the right to stop *in transitu* existed when the notice was given. That right of an unpaid vendor continues until the goods have come into the actual possession of the purchaser, treating for this purpose the possession of his agent or servant as his possession. The rule was stated by Lord *Cairns* in *Berndtson* v. *Strang* (1), and I think it is clearly established that so long as goods are in the hands of a carrier as carrier, they are not in the actual possession of the purchaser, whoever may have nominated the carrier. The contract with a carrier to carry goods does not make the carrier the agent or servant of the person who contracts with him, whether he be the vendor or the purchaser of the goods. Here the verbal agreement which the purchaser entered into to charter the ship did not make the captain the agent or servant of the purchaser; he was only a carrier. But Mr. *Northmore Lawrence* ingeniously raised this point, that there can be no stoppage *in transitu* unless there is a transit, and he said that, the contract being only to deliver the clay on board the ship, and no further destination having been communicated to the vendors, the transit was at an end so soon as the clay was delivered on board the ship. The cases no doubt shew that there is no right to stop *in transitu* if the goods have once come into the possession of the purchaser, even though the vendor has afterwards regained the possession of them. The argument of the trustee must come to this, that the goods have come into the hands of the purchaser, and that the shipment has been then made by him. Here the contract was that the goods were

(1) Law Rep. 3 Ch. 588.

C. A. 1879 *Ex parte* Rosevear China Clay Company. *In re* Cock.

to be placed on board by the vendors, not by the purchaser. The purchaser was to indicate where the goods were to go, and only when they had reached that destination would they come into his actual possession. If the contract had been to deliver the clay to an agent of the purchaser at *Fowey*, it would have been a very different matter. The case would then have been like that of *Valpy* v. *Gibson* (1), in which the shipment was made by the purchaser, not by the vendor.

Appeal allowed with costs.

Solicitors for Company: *Ingledew, Ince, & Greening*, agents for *Ingledew, Ince, & Vachell, Cardiff.*

Solicitors for Trustee: *Gregory, Rowcliffes, & Rawle*, agents for *Hodge, Hockin, & Marrack, Truro.*

C. A. 1879 *April* 24.

Ex parte BLAKE. *In re* McEWAN.

Trustee in Bankruptcy—Disclaimer—Proof for Damages—Lease for Term determinable by Lessee — Measure of Damages — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23.

A lease of a house for twenty-one years, at a rent of £130 a year, was determinable by the lessee at the end of the first seven or fourteen years of the term on his giving six months' previous notice in writing to the lessor, and paying the rent and performing the covenants up to the day of the term being determined. Near the end of the sixth year of the term the lessee filed a liquidation petition. The trustee in the liquidation disclaimed the lease. There was evidence that the house could only be let at a diminished rent:—

Held, that the lessor was entitled to prove in the liquidation for the diminution in the rent up to the end of the seventh year of the term, and the amount necessary to put the house in repair.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

On the 7th of December, 1872, *B. G. Lake* and *C. H. Blake* granted to *J. T. Howie McEwan* a lease of a house and premises known as No. 3 *Stanley Gardens, Notting Hill*, for twenty-one

(1) 4 C. B. 837.

years from the 25th of December, 1872, at the yearly rent of £130. The lease contained (*inter alia*) a covenant by the lessee to keep the premises in repair, and a proviso that it should be lawful for the lessee, his executors, administrators, or permitted assigns, to determine the demise at the expiration of the first seven or fourteen years of the term thereby granted, by giving six calendar months' previous notice in writing to that effect unto the lessors, their heirs or assigns, and on paying the rent thereinbefore reserved, and performing and observing the several covenants and agreements by the lessee therein contained up to the day of the term being so determined.

In September, 1878, *McEwan* filed a liquidation petition, and on the 7th of October, 1878, his creditors resolved on a liquidation by arrangement, and appointed a trustee. On the 4th of December the trustee, with the leave of the Court, disclaimed the lease. On the 6th of December the lessors tendered a proof against the estate for, 1. £140 due from the estate on account of the breach of the lessee's covenant to repair the premises, notice to repair having been given on the 15th of November, 1878. 2. £150 as being the loss caused to the lessors by the disclaimer of the lease, on the ground that the value of the premises had diminished, and that the lessors could not then obtain for them upon a similar lease a higher rent than £120, thus shewing a depreciation in value of £10 per annum. 3. £22 0*s.* 4*d.* for two months rent of the premises from the 29th of September, 1878, to the 29th of November, 1878, on which day the order giving leave to disclaim was made. The trustee admitted the first and third items of the proof, but rejected the second to the extent of £140, "on the ground that the lease was determined by the lessee, his executors, administrators, or assigns, on the 25th of December, 1879." The Registrar affirmed the decision of the trustee. The lessors appealed.

H. J. Lake, for the Appellants:—

The effect of the disclaimer is that it is impossible that notice can be given to determine the lease at the end of the first seven years; the disclaimer itself did not operate as such a notice. Moreover, the notice cannot be given unless all the covenants and

C. A. 1879 *Ex parte* BLAKE. *In re* MCEWAN.

conditions of the lease have been performed. The performance of the covenants and conditions is a condition precedent to the existence of the lessee's power to put an end to the lease: *Grey* v. *Friar* (1); *Porter* v. *Shephard* (2). When the notice expires there must not exist any cause of action in respect of the performance of the covenants. Here there is clearly a breach of the covenant to repair, and the trustee has admitted a proof in respect of that breach. The trustee by disclaiming has rendered it impossible that the lessors should have the house in a proper state of repair, or should receive sufficient compensation at the end of the seven years.

R. Vaughan Williams, for the trustee:—

The question is, what is the damage which has been done to the lessors by reason of the disclaimer? What would they have had if there had been no disclaimer? They have only lost a lease determinable at the end of the seven years at the option of the lessee upon his performing certain conditions. They now say that this conditional right has been converted into an absolute right to the lease for the whole of the term.

[COTTON, L.J.:—Only if the lessee does not put the house into repair.]

They have not lost more than the difference in the rent for one year, plus the sum necessary to put the house into proper repair, and that is the sum for which their proof has been admitted. They are seeking to prove for the £140 twice over.

Lake, in reply.

It must not be assumed that the lessee, if he had not filed a liquidation petition, would have given notice to determine the lease.

[JAMES, L.J.:—We must assume that. We have to divide an insufficient estate fairly among all the creditors.]

It must not be assumed that all the other covenants would have been performed. We are entitled to look at the state of things at the date of the disclaimer; at that time the covenants were

(1) 4 H. L. C. 565. (2) 6 T. R. 665.

not performed, and they could not be performed after they had ceased to exist.

JAMES, L.J.:—

I think that the Registrar's order is right. We have to consider how this insolvent estate is to be fairly distributed among the different creditors, and therefore we must see to what extent the landlords are creditors. They have sustained damage by their tenant's not complying with the conditions of his lease. What would have been their position if the tenant had remained solvent, and had acted as a reasonable man? We must assume that when the landlord gave notice to put the premises in repair the tenant would have complied with it, so as to entitle himself to give notice to determine the lease at the end of the seventh year. The landlords, therefore, have lost by the tenant's becoming bankrupt, the benefit of his being under an obligation to spend £140 in repairing the premises, which is much more than the present value of the £10 a year by which the rent that can be obtained is diminished. That, with the depreciation to the end of the seven years, is the loss which the landlords have sustained, and the sum in respect of which they are entitled to share in the distribution of the debtor's assets.

BRETT, L.J.:—

The lessee could have put an end to the lease by paying the rent, and performing the covenants up to the end of the first seven years, and by putting the house in repair. What then has the landlord lost by the bankruptcy? Clearly, the difference in the rent up to the end of the seven years and the £140 necessary to put the house in repair.

COTTON, L.J.:—

The simple question is, what is the amount of the damage which has been sustained by the landlords? The lessee would not have been entitled to put an end to the lease without paying the rent up to the end of the seven years, and doing the necessary repairs, or paying the value of them. By the operation of the trustee's disclaimer the landlords have got possession of the house earlier than

C. A. 1879 *Ex parte* BLAKE. *In re* MCEWAN.

they otherwise would, and they are entitled to prove for the difference in the letting value of the house up to the end of the seven years, and the difference between the value of the house in repair and of the house out of repair. The appeal must be dismissed.

Solicitors for Appellants: *Lake, Beaumont, & Lake.*
Solicitors for Trustee: *Ingle, Cooper, & Holmes.*

C. A. 1879 *May* 7.

WILSON *v.* CHURCH.

[1878 W. 81.]

Practice—Appeal—Staying Proceedings—Action altogether dismissed—Injunction granted by Court of Appeal—Rules of Court, 1875, *Order* LVIII., *rr.* 2, 5, 16, 17.

When an action has been altogether dismissed by a Divisional Court no order can be made under Rules of Court, 1875, Order LVIII., rule 16, to stay proceedings pending an appeal; but the Court of Appeal will, in a proper case, grant an injunction to restrain any of the parties parting with property till the hearing of the appeal. ✕

THE action in this case was brought on the 2nd of March, 1878, by *W. M. Wilson*, on behalf of himself and all other holders of the bonds of the Republic of *Bolivia*, and the Republic of *Bolivia* against Colonel *Church*, the *National Bolivian Navigation Company*, the *Madeira and Mamoré Railway Company*, and *J. H. Lloyd*, and *A. J. Lambert*, who were trustees for the bondholders, claiming a declaration that a trust fund of large amount in the hands of the trustees should be returned to the bondholders and not applied in payment of the works on the railway.

Four days after the commencement of the action another action was brought by the *National Bolivian Navigation Company* and the *Madeira and Mamoré Railway Company* against the trustees *Lloyd* and *Lambert*, to which the Plaintiffs in *Wilson* v. *Church* were not parties, claiming a declaration that the trustees might properly pay £7266 10*s.* 4*d.* out of the trust fund to the Plaintiffs in that action.

On the commencement of the second suit the Plaintiffs in *Wilson* v. *Church* applied to the Master of the Rolls for an injunc-

S.C. on appln for stay of distribution pending appeal 1 Ch D. 1 C.A. stay refused
S.C. Lush Hy 2 Sch App Cas 176
✕ But appln to stay proceedings by respondent to enforce

tion to restrain the Defendants, the trustees, from parting with any part of the funds, which resulted in the trustees giving an undertaking not to part with any portion of the funds until the trial of the action, without the direction of the Court.

The actions were heard before Mr. Justice *Fry*, to whom they had been transferred from the Court of the Master of the Rolls, and on the 24th of April, 1879, His Lordship dismissed the action of *Wilson* v. *Church* with costs; and afterwards in the action of *National Bolivian Navigation Company* v. *Lloyd*, His Lordship ordered that the trustees should pay the sum of £7266 10*s*. 4*d*. to the contractors of the railway company out of the funds in their hands.

The Plaintiffs in *Wilson* v. *Church* appealed at once against the judgment of Mr. Justice *Fry*, and on the 30th of April, by special leave, they served all the Defendants with notice of motion before the Court of Appeal for an injunction to restrain the trustees from parting with any part of the trust fund in their hands until the hearing of the appeal; and that the appeal might be advanced.

The motion now came on for hearing.

Southgate, Q.C., and *Cozens-Hardy*, for the application:—

The action having been dismissed altogether by Mr. Justice *Fry*, we cannot make any application to stay proceedings in his Court: *Galloway* v. *Corporation of London* (1). Therefore unless the Court of Appeal will entertain this motion for an injunction, the Plaintiffs have no remedy and the fund may be irretrievably lost before the appeal comes on to be heard. If the appeal is advanced no inconvenience can happen to the Defendants. The Court of Appeal has power to make the order under Rules of Court, 1875, Order LVIII., rules 2, 5.

North, Q.C., and *Rigby*, for the Navigation Company and the Railway Company:—

This is in substance an application to stay proceedings pending an appeal. The course prescribed by the *Judicature Act* and the present Rules is, that such an application should be made in the

(1) 3 D. J. & S. 59. 11 Jur. N. S. 537.

C. A. 1879 WILSON v. CHURCH.

first instance to the Judge who tried the action and who knows the whole circumstances of the case: Order LVIII., rules 16, 17: *Attorney-General* v. *Swansea Improvements and Tramways Company* (1). If the Court has jurisdiction it ought not to be exercised in this case, there being no danger of irreparable mischief: *Walburn* v. *Ingilby* (2).

Macnaghten, for the trustees.

JESSEL, M.R.:—

The action having been absolutely dismissed by Mr. Justice *Fry*, he had no jurisdiction to stay the proceedings pending the appeal, and this application for an injunction was properly made to the Court of Appeal.

The appeal may be advanced and be in the paper on the 19th instant, and there will be an injunction to restrain the trustees from parting with any part of the fund till the hearing of the appeal.

BRETT and COTTON, LL.J., concurred.

North asked for security for costs of the appeal.

The Counsel for the Appellants did not oppose the application.

JESSEL, M.R.:—

I think it reasonable, under the circumstances. Let the Appellant bring £200 into Court, as security for costs. The costs of the motion will abide the result of the appeal.

Solicitors: *Wilson, Bristows, & Carpmael; W. W. Wynne.*

(1) 9 Ch. D. 46. (2) 1 My. & K. 61.

In re SOUTH DURHAM IRON COMPANY.

SMITH'S CASE.

C. A. 1878 V.-C. H. *Dec.* 16. C. A. 1879 *April* 2, 8.

Company—Registration of Mortgages—Director—Mortgage to Partners, one of whom is a Director—Practice—Binding Character of previous Decisions.

The firm of *T. S. & Co.*, consisting of three partners, of whom *T. S.* was the managing partner, advanced a sum of money to the *D. Company, Limited*, of which *T. S.* was one of the directors, the company accepting a bill of exchange drawn on them by *T. S. & Co.* This bill was subsequently renewed in the name of *T. S.* alone, but it was known to the company that the debt remained a debt due to the firm. When the renewed bill became due the company deposited with *T. S.* certain iron as a security, which he held on behalf of his firm. The register of mortgages kept by the company contained no notice of this transaction. The company having afterwards been ordered to be wound up, the liquidator claimed to have the iron delivered to him, on the ground that as *T. S.* was a director the security was bad for want of registration, as in *In re Native Iron Ore Company* (1):—

Held, by *Hall*, V.C., and on appeal by *Jessel*, M.R., and *Bramwell*, L.J. (*dissentiente Baggallay*, L.J.), that the rule in *In re Native Iron Ore Company* did not apply to a case where the mortgage was made to partners who were not all directors of the company.

Consideration of the circumstances under which a Court may overrule previous decisions of the same Court.

THE *South Durham Iron Company* was a company limited by shares and incorporated on the 19th of September, 1872.

On the 1st of May, 1875, the directors, who had full authority to borrow money and mortgage any part of the property of the company, borrowed £6000 from *Taylor Smith Brothers*, who drew upon the company a bill for £6183 10*s.*, payable on the 4th of October, 1875, being the amount of the loan with interest up to that date. The firm of *Taylor Smith Brothers* consisted of three partners, of whom *Thomas Taylor Smith*, one of the directors of the company, was the managing partner.

On the bill becoming due it was renewed by the company's accepting a bill drawn by *Thomas Taylor Smith* alone on the company, payable on the 4th of April, 1876, which again was renewed by the company accepting a bill drawn by him and becoming due

(1) 2 Ch. D. 345.

C. A. 1879 SMITH'S CASE.

on the 4th of October, 1876. On that bill becoming due the following minute was passed by the directors:—

"That in order to meet the company's acceptance of Mr. *Taylor Smith's* draft for £6183 10*s.* due this day, a receipt be given him for the sum of £990, being the amount of the unpaid capital upon the old and additional shares held by him in the company; and that, to secure the rest, warrants for 2500 tons of pig be given to him between this date and the 18th instant."

In accordance with this minute entries were made in the books of the company crediting *T. Taylor Smith* with £990, as paid for calls on his shares, reducing the loan account to £5193 10*s.*, and warrants for 2500 tons of pig iron were delivered to him indorsed in blank.

On the 1st of March, 1876, the company paid to *T. Taylor Smith* £1800 on account, and he returned warrants for 1000 tons of pig iron.

At the date of the resolution for winding up the company there was due on the loan £3293 10*s.* and interest.

Thomas Taylor Smith deposed, and his evidence was not contradicted, that the shares which he held in the company were held by him on behalf of his firm, and the calls paid with their money, and that these facts were known to the whole of the board of directors, and to the secretary and solicitor of the company. He further deposed that the loan of £6000 was a loan made by the firm, paid by their cheque out of the partnership funds, and was so treated in the company's books; and that the only reason why the original draft of *Taylor Smith Brothers* was renewed by the drafts of himself alone was because he had always managed the partnership business and funds, and had frequently dealt with them in his own name. He further deposed that the interest on the loan was always carried to the credit of *Taylor Smith Brothers.* He went on to state that in the books of the warehousemen who kept the iron in question it was entered as belonging to *Taylor Smith Brothers*, and they were debited with the rent, and that the warrants for the remaining 1500 tons of iron were in the possession of the firm.

In the company's ledger the loan was throughout treated as a loan by the firm.

The company kept a register of mortgages, as prescribed by the *Companies Act*, 1862, s. 43, but it contained no entry of any description relating to the security for the £3293 10*s*.

An order had been made for continuing the voluntary winding-up under the supervision of the Court. The liquidator now applied for an order on *T. Taylor Smith* to deliver up the warrants to him. The application was heard before Vice-Chancellor *Hall* on the 16th of December, 1878.

Morgan, Q.C., and *Proctor*, for the Liquidator:—

The debt must be considered to have been *T. Taylor Smith's* and not that of his firm. That is the substance of the transactions. There has not been a compliance with the *Companies Act*, 1862, sect. 43, which requires that every limited company shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register a short description of the property mortgaged or charged and all particulars, and that the register shall be open to inspection by any creditor or member of the company. There was no attempt made by the directors to register *T. Taylor Smith's* warrants, which may be considered to be in the nature of a charge upon the iron, and therefore it seems to be quite clear, looking at the provisions of the 43rd section and the decisions in the cases, that he cannot set up this charge as against the general creditors of the company. The result of the decisions appears to be that an unregistered charge in favour of a director is *ipso facto* void. *T. Taylor Smith* being a director it was incumbent upon him to see that the requirements of the statute were fully carried out by the company, but that not having been done it is submitted that the right to the iron still remained in the liquidator, and that he is entitled to the possession of the warrants: *Ex parte Valpy & Chaplin* (1); *In re Wynn Hall Coal Company* (2); *In re Native Iron Ore Company* (3).

If *T. Taylor Smith* had got the iron into his own possession it might have been worked up and the security, instead of being equitable, would have been realized. This case was therefore dis-

(1) Law Rep. 7 Ch. 289. (2) Law Rep. 10 Eq. 515.
(3) 2 Ch. D. 345.

C. A. 1879 SMITH'S CASE.

tinguishable from *In re General Provident Assurance Company* (1); *In re Marine Mansions Company* (2); *In re Borough of Hackney Newspaper Company* (3); and *In re International Pulp and Paper Company* (4).

Dickinson, Q.C., and *Caldecott*, for *T. Taylor Smith*:—

The delivery of the warrants gave *T. T. Smith* legal and equitable power to dispose of the iron as he might think fit. There was clearly a manual delivery of possession of the property, and there was no necessity to cause any registration of the transaction under the 43rd section of the *Companies Act*, 1862. Even according to the provisions of the Act, and the cases which have been referred to, this was a good security. The money lent belonged to the firm, one of which was a director. In *Ex parte Valpy & Chaplin*, *Valpy* and *Chaplin* were considered to be solicitors of the company and the advisers of the transaction, and that case is altogether distinguishable from the present, but it would have been similar if Mr. *Valpy* had alone acted as solicitor. The liquidator in looking through the company's books has made a mistake in assuming that the money was advanced by a partner and not by the firm. The evidence shews that it was lent by the firm, and that the balance due belongs to the firm. It is admitted that the acceptances were renewed in the name of *T. Taylor Smith*, but it is proved that the money came from the firm, and that the part payment and interest were credited in their books, and any person looking at the company's books would see that the account was with the firm and not with an individual partner. There is nothing in the Act to shew that the transaction is void, and there is nothing which imposes a duty upon the person entitled to a charge to have it registered, except it be the position of director or officer of the company, of the person seeking the benefit of the security, but the persons seeking that benefit here are the firm, and they are not directors or officers of the company. The individual member of the firm who was a director is not a person who claims the benefit of any security. He has an interest in it, but only the same that each partner

(1) Law Rep. 14 Eq. 507.
(2) Ibid. 4 Eq. 601.
(3) 3 Ch. D. 669.
(4) 6 Ch. D. 556.

has and no more. The firm has an undoubted right to this debt, and the summons ought to be dismissed.

Morgan, in reply.

HALL, V.C. :—

The question which has arisen is not without considerable difficulty, looking at the authorities which have been referred to. I must bear in mind the origin of the transaction; it was without doubt a loan by partners who constituted a firm, and therefore it appears to me that it is not a case in which, upon a fair and reasonable construction of the Act of Parliament, it can be held that the members of the firm omitted any duty whatever. There is nothing which would justify me in extending the operation of the 43rd section of the statute. Before saying that those persons who originally lent partnership money omitted to perform a duty it must be shewn that they omitted that duty personally, that they did not personally or otherwise authorize their partner to do anything in perfecting the security; as they have not omitted a duty, I cannot extend the Act of Parliament to them. That, then, was the nature of the security in its original inception, and I hold that non-registration of it did not in any way operate against or prejudice the rights of the partners or those who were not directors. That could only be so by some process of dividing the security. If the liquidator desired to establish a case of that kind and to deprive the director-partner of his beneficial interest in the security, it seems to me that it would be incumbent upon him to shew what beneficial interest he had in it. He would not be justified in merely saying that it was in the three partners. It was said that the case had changed since the advances were first made, and that the security became that of the director-partner only, but I do not find anything in the evidence to shew that the partners who were not directors did anything to extinguish their claim against the company; further than this, that upon the renewal of certain acceptances in reference to the original loan the new acceptances were taken, not in the name of the firm, but in the name of the individual partner who managed the business of the firm. But these acceptances were mere renewals of the

C. A. 1879 — SMITH'S CASE.

original, and that is borne out and confirmed by the evidence, shewing the mode in which the accounts were kept. There was no change in the title of the accounts, and nothing to justify an argument that there was a novation of them either as regards the creditors or debtors. There was in fact no break in the accounts, but they were always with the firm, and the moneys received and paid were brought into those accounts. I think that the claimant is entitled to the benefit of the warrants, that the liquidator's claim has not been established, and that therefore it must be dismissed with costs—his costs to be paid out of the estate.

The liquidator appealed from this decision. The appeal came on to be heard on the 2nd of April, 1879.

Morgan, Q.C., and *Proctor*, for the liquidator:—

The principle of the cases is that a director whose duty it is to have a security registered cannot avail himself of his own wrong and insist on his security if it is not registered. The Act says that the company shall keep a register, and imposes a penalty for breach of the enactment. This must apply to the directors, through whom alone the company can act. We should contend, if necessary, that the Respondent is within the penal clause, but we say that apart from this the want of registration avoids the security. The case turns on the *Companies Act*, 1862, s. 43. The *Companies Act* of 1856 had no provisions for registration, and pocket securities were often made to directors, to remedy which mischief this section was inserted in the Act of 1862. This clause throws a duty on the mortgagor for the benefit of subsequent incumbrancers. The invalidity of an unregistered mortgage to a director is settled by a chain of cases. The principle can be traced in *In re Wynn Hall Coal Company* (1) and *In re General Provident Assurance Company* (2), but the leading cases are *Ex parte Valpy & Chaplin* (3) and *In re Native Iron Ore Company* (4). The rule is stated by the Master of the Rolls in *In re Borough of Hackney Newspaper Company* (5). The Vice-Chancellor held

(1) Law Rep. 10 Eq. 515.
(2) Ibid. 14 Eq. 507.
(3) Law Rep. 7 Ch. 289.
(4) 2 Ch. D. 345.
(5) 3 Ch. D. 669, 671.

that this case was taken out of the range of the authorities by reason of the partnership, but the ground, we submit, is not sufficient. *Smith* was the managing partner intrusted with the money of the firm, and his was the legal hand to receive it. The mortgage was not made to the firm, and how can the fact that other persons had an interest in the money relieve the mortgagee from the obligation to register? But suppose the mortgage had been made to the firm, we contend that a person cannot better his security by associating other persons with him in taking it.

Dickinson, Q.C., and *Caldecott*, *contrà* :—

It is too late to treat the question solely on principle, but were it not for the authorities we should argue that the Act imposes a pecuniary penalty for omission to register, and that the Court cannot impose a further penalty. The principle of the cases is not to be extended. We first rely on the fact that this is not a case of a simple mortgage to a director, but to a director who, as was known to everybody concerned, was advancing the money of his firm. Although in the affairs of a company trusts generally are not looked to, they are in some cases to be regarded: *Burkinshaw* v. *Nicolls* (1). A trustee must have a reasonable time within which to register. The interest of the *cestuis que trust* attaches at once, and how is it to be taken out of them by their trustee's omission to register? The director who advanced the money had no specific interest in it, but only his interest as a partner in all the assets of the firm; he may have been indebted to the firm, and so have had no beneficial interest at all in this debt. The loan is by the firm and the negligence is by the director as an agent of the debtor company, which surely cannot postpone the lenders. The authorities all shew that there is no obligation on the lender to see to registration. Then we say that this is not a charge which required to be registered under sect. 43 of the Act. What is there that could be registered?

[JESSEL, M.R. :—The Act does not require you to register the instrument creating the charge, but the property charged.]

The resolutions created no charge; there was no charge till delivery; and suppose a number of warrants delivered separately,

(1) Law Rep. 3 App. Cas. 1004.

C. A. 1879 SMITH'S CASE.

is an entry of the delivery of each to be made, or is there to be an entry of all when the delivery is complete? It could not be the intention of the Act to affect mortgagees by a penal clause of this kind in circumstances as to which there is so much difficulty. The foundation of the cases is not that an unregistered security is bad, but that it is against conscience for the person guilty of default to avail himself of it. How is the conscience of the firm to be affected? The argument is, your trustee was guilty of a breach of duty to the borrowing company, therefore your security shall be void.

[BRAMWELL, L.J.:—The cases seem to go on the personal disability of the party in default to set up his mortgage. Can that extend to the case where he is only one of several?]

We submit that it cannot. The personal character of the equity is strongly stated both in *Ex parte Valpy & Chaplin* (1) and *In re Native Iron Ore Company* (2). A deposit of chattels of the company which are put out of its possession are not within the mischief intended to be remedied by the Act.

Morgan, in reply:—

In *Imperial Mercantile Credit Association* v. *Coleman* (3) the vice of a transaction was held to affect the other partner, though not personally concerned it.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Hall*, and the sole point which we have to decide is, whether the circumstances of this case are such as to distinguish it from two decisions of the Court of Appeal by which we are bound.

The first of these decisions is *Ex parte Valpy & Chaplin* (4), in which solicitors employed by the company took a charge on certain debts due to the company, which charge was not registered, and the Lord Justice *James* in giving judgment says: "As it is the duty of the officers of the company to see that every charge specifically affecting property of the company is registered, I am of

(1) Law Rep. 7 Ch. 289.
(2) 2 Ch. D. 345.
(3) Law Rep. 6 H. L. 189.
(4) Ibid. 7 Ch. 289, 291.

opinion that no director, manager, or other officer of the company can avail himself of a charge which is not registered. Every one standing in a fiduciary position towards the company is bound to see that the company obeys the directions of the Legislature; and I am of opinion that the failure of the Appellant to do so is fatal to his case." That, therefore, was a decision that an officer, as he was held to be, of the company, being owner of an unregistered charge, could not avail himself of it in the winding-up.

The next decision was given in the matter of *In re Native Iron Ore Company* (1) by the full Court of Appeal.

In that case there was a registration, but an imperfect one, not complying with the requisitions of the Act of Parliament. Lord Justice *Mellish* gave the first judgment, and he said: "It is an established rule that where a director or officer of a limited company advances money on the security of a debenture or mortgage of the company and omits to register it in accordance with the Act, the consequence is that he has no charge as against the creditors. The point was, in the first instance, so held by Vice-Chancellor *Malins* in the case of *In re Wynn Hall Coal Company* (2), and by the late Master of the Rolls in *Ex parte Valpy & Chaplin* (3), and that decision was afterwards affirmed on appeal." He then goes into the question of the distinction between a mortgage imperfectly registered and one not registered at all, and he holds that there is no substantial distinction. Lord Justice *Baggallay* says: "I entirely concur, and I adopt the language used by Lord Justice *James* in the case of *Ex parte Valpy & Chaplin*," and then he quotes it, and Lord Justice *James* concurs. And that is the whole of the authority on the point.

The first question we have to consider is, what do the decisions mean? I must repeat here an observation which I made in the Rolls Court with reference to these very decisions, that it is a matter of great difficulty to a Judge who disapproves of a decision to be quite sure that he is honestly distinguishing the case in which it was given from the case before him. Of course the inclination of his mind is to find every distinction sufficient, and therefore he must be particularly on his guard to see that he does not

(1) 2 Ch. D. 345. (2) Law Rep. 10 Eq. 515.
(3) Law Rep. 7 Ch. 289.

C. A. 1879 SMITH'S CASE. Jessel, M.R.

unfairly distinguish with a view to getting rid of the original decision. I have tried in every instance before me to be thus on my guard, but whether I have succeeded or not will be for others to say. Now, in the case of *Ex parte Valpy & Chaplin* (1), Lord Justice *James* said that the mortgage is not made void for want of registration; and in the subsequent case of *In re General South American Company* (2) the full Court of Appeal also held that the mortgage was not void for want of registration, and that shareholders not being directors who took the benefit of that mortgage were entitled to enforce their security, because they were not directors, managers, or officers.

Therefore we have these two points established, first, that a director, manager, or officer cannot avail himself of the security; and, secondly, that the security is valid, and is available to any person not occupying those positions. The result, to my mind, is that, according to the decisions, there is a personal disqualification in the director (I use that word as meaning director, manager, or officer) to avail himself of the security, that is, if when he comes forward to enforce the security it can be shewn that he was at the time of the creation of the security a director, he cannot avail himself of it. If that is the true view of the decisions, is not there a principle of equity that you shall not extend a personal disqualification to the prejudice of the innocent? I have always considered that equity sets itself most emphatically against forfeitures and penalties being imposed unless they are imposed in the most direct and unequivocal manner, and I have always considered it to be a principle of equity that where there is a personal equity attaching to a man in relation to property, it is not, as a rule, to affect innocent parties.

Now, ought we to apply, and if so, how ought we to apply, that principle where the security was originally given to a partnership in which the director was a partner, or was afterwards transferred to a partnership in which the director was a partner? In one sense, of course, all the partners are liable for the acts and defaults of their co-partners in the course of the carrying on of the partnership business. On the other hand, it may be said you ought not to affect the interests of innocent co-partners by

(1) Law Rep. 7 Ch. 289. (2) 2 Ch. D. 337.

attaching to them the consequences of the personal default of their partner, not as their partner in the course of the partnership business, but in another character, viz., that of managing partner of another partnership business. It appears to me that inasmuch as if you apply the rule of forfeiture, you affect the interests of the innocent partners, and if you do not apply it you may to some extent benefit the partner who has been guilty of default; the rule of equity compels you to say that in that case you would rather give some benefit to the defaulter than enforce the forfeiture against those who are innocent. It appears to me, therefore, that the rule ought not to apply to a case of partnership.

There is another reason which has weighed with me, namely, the argument of inconvenience. There still are in this country many joint stock companies with unlimited liability and not incorporated, though they are not so numerous as they formerly were. If one of those companies were to lend money to an incorporated company with limited liability, and it turned out that one of their shareholders was one of the directors of the borrowing company, it would appear very unjust that a man who held perhaps a one-hundred-thousandth part of the property of the lending company should by his omission as manager or managing partner of the borrowing company destroy the security in the hands of the lending company. The same question would arise in the case of joint-stock companies formed under the Act of 1862, if the lender company had a director (the rule would not apply to a shareholder, as a shareholder in these incorporated companies has no share in the management) who happened also to be a director of the borrowing company. This argument from convenience is not to be forgotten, and it makes me the more prepared to hold with the Vice-Chancellor that the decisions with regard to personal disqualification are not to be extended to cases of partnership.

I now come to consider the facts of the case, and, speaking for myself alone, they do not appear to me to admit of controversy as to their legal effect. The money was originally lent to the company by a firm of *Taylor Smith Brothers* out of the money of the firm, it was a loan by the firm to the company, and is so entered in the company's books. In the first instance bills were drawn by the firm of *Taylor Smith Brothers* in their own names on the

C. A. 1879 SMITH'S CASE. Jessel, M.R.

company, and were accepted by the company. Those bills were not taken up at maturity, and the firm of *Taylor Smith Brothers* having gone into liquidation, I do not mean an insolvent liquidation, but being in process of winding up, the bills came to be renewed, and they were renewed in the name of one of the three partners, Mr. *Thomas Taylor Smith.* After being so renewed, a resolution was passed by the company for giving security for part of the money, and taking the other part in satisfaction of a call which was due upon the shares of Mr. *Thomas Taylor Smith.* The security which they determined to give him was a security on certain iron warrants, which were to be handed over to him. They were accordingly handed over, and then Mr. *Taylor Smith* handed them over to his partnership firm, and they were entered by the warehousing company, in whose actual possession the iron was, in the name of the firm of *Taylor Smith Brothers.* The company afterwards came to be wound up, and the iron, except some portion which had been realized and which it is unnecessary to consider for this purpose, so remained, and the present summons was taken out by the liquidator to have possession of that iron delivered up to him.

Now I cannot find any evidence whatever of any authority on the part of the firm to change the original debt due to the firm into a debt due to Mr. *Taylor Smith.* Of course if the firm had brought an action against the iron company the company must have pleaded either accord and satisfaction or payment, and without evidence of authority from the firm, it appears to me that the company could not have established their defence. The result, therefore, is that the debt at the moment of the security being given was still due to the firm. Whether the bill drawn by Mr. *Taylor Smith* is to be treated as a collateral security or not it is not necessary to decide, but it appears to me it must be so treated in the absence of authority given by the firm to change the debt.

That being so, the security was intended to be a security for the debt due to the firm, and this is evidenced by the ledger of the company, which has been produced, and in which the account headed originally "*Taylor Smith Brothers,*" remains without alteration to the end, and credit is given in it for those very acceptances drawn in the name of Mr. *Taylor Smith* alone as being a credit in

favour of the firm of *Taylor Smith Brothers*. It was also stated to us, and not denied, that there was an inspection of the books of the firm, and I think it not an unfair inference that if anything advantageous to the Appellant could have been found in those books we should have heard something of their contents. Under those circumstances, it appears to me that the security was given for the debt of the firm.

But I now pass to another point. Assume, which is the most favourable view of taking it for the Appellant, that my previous opinion is not well founded, then the security was given to Mr. *Taylor Smith* as trustee for his firm, for there is not a pretence of saying that there ever was any arrangement between the firm and Mr. *Taylor Smith* by which he became the owner of this debt. He then handed the warrants over to his firm, whether he actually indorsed them or not is not material, and directions were given to the warehousing firm, with which they complied, to warehouse the goods in the name of the firm. The result is, that the firm would be transferees of the security.

Now, as I understand the decisions, a transferee is not affected in the slightest degree by the fact that a security was originally given to a director, and there is a very good reason for it, for a transferee could not know whether or not the security had ever been held by a director. A director takes a security perhaps in the name of a trustee for himself, perhaps in his own name, and then transfers it to *B.*, who transfers it to *C.*, and so on, when you come to the twentieth man he cannot find out or know whether a year or two ago the man who originally took the mortgage was or was not a director at that time. It appears to me that the personal disability is the personal disability of the holder when he comes to enforce his charge, and that unless he has himself been guilty of some default he does not lose the benefit of his security.

There is one other observation which I should like to make about the position of a partnership. It was very much pressed upon us that a man could not by taking partners rid himself of a liability, but I think the answer to that is very simple. In the present case you can determine in what character the act was done. Mr. *Taylor Smith*, we will assume for this purpose, effected

C. A. 1879 SMITH'S CASE. Jessel, M.R.

the loan, or rather took the security for the loan, which had been previously made on behalf of his firm. His action as agent for the firm, or as managing partner, ceases when the security is effected. The registration is the duty of the company, the neglect to register is by an officer of the company, and therefore the wrongful omission to register, which is what involves the personal disqualification, would be the act of Mr. *Taylor Smith* as an officer of the company. You can therefore see that it was not as a partner of his firm, but as a managing partner or director of his company, that he was guilty of the omission.

Now, when we are dealing only with the case of an individual it may well be that you cannot sever the two characters, but where you have a man acting as agent for two bodies, and you can sever the characters, it appears to me anything but just to attribute the act of omission to any other character than that alone in which it was possible for him to be guilty of it, viz., as agent of the company. The result of that omission ought to fall upon the principal, viz. upon the company, whose agent he was, and acting as whose agent he made the omission.

There is one other observation to be made. If the director by reason of any misfeasance of his has inflicted loss on the company the company is not without remedy, but if he has inflicted loss on his partners it does not appear to me at present that they would have any remedy. That also is an additional consideration, which, I think, ought to weigh with the Court in deciding whether or not the doctrine of disqualification is to be applied to this case.

I will make one final remark, which I hope does not conflict with the decisions by which I am bound, and that is that personal disqualifications involving forfeiture are odious in equity, and that they ought not in any case without absolute necessity to be extended further than actual decided law warrants. I think that in this case no such necessity exists, and therefore I am of opinion that the Vice-Chancellor's conclusion is correct, and ought to be affirmed.

BAGGALLAY, L.J.:—

At an early stage of the arguments on this appeal I suggested that there were but two questions to be considered and decided,

and I remain of the same opinion. The first is whether the Court of Appeal, as at present constituted, is bound by the decisions given in *Ex parte Valpy & Chaplin* (1) and *In re Native Iron Ore Company* (2); and, if the present Court of Appeal is so bound, whether the case which is now under consideration can be distinguished from that of *In re Native Iron Ore Company*.

Now, with regard to the first question, the answer generally would certainly be that the Court as now constituted is bound by the previous decisions of the same Court. But I am far from saying that there are not exceptional circumstances under which the Court would not necessarily be so bound. I may mention, by way of illustration, a case in which a decision has been very recent, and the circumstances connected with it shew that it was not very fully considered. Again, where doubts are entertained by one or more of the Judges who had taken part in such decision; and thirdly, though more rarely, where there is a concurrence of opinion, outside the members of the Court so constituted, to the effect that the decision was one which could not be supported; but, in my opinion, none of those reasons apply in the present case.

The decision in the case of *In re Native Iron Ore Company* may be simply stated in this way: If a director of a company advances money to the company, and takes as security for such advance a charge upon property of the company, and omits to register such charge, he is not at liberty to avail himself of such security as against the other creditors of the company. That point has not been recently decided for the first time; it was originally decided by Vice-Chancellor *Malins* in *In re Wynne Hall Coal Company* (3) as long ago as the year 1870. That decision was followed by Lord *Romilly* at the Rolls in *Ex parte Valpy & Chaplin*, and his decision was affirmed by Lord Justice *James*, sitting alone, in the Court of Appeal. It was again followed in the case of *In re Native Iron Ore Company*, and in that case the Lord Justice *James* said to Lord Justice *Mellish* and myself, that, inasmuch as that previous decision had been come to by himself sitting alone, he was anxious that we should very fully consider the case, and

(1) Law Rep. 7 Ch. 289. (2) 2 Ch. D. 345.
(3) Law Rep. 10 Eq. 515.

C. A. 1879 SMITH'S CASE. Baggallay, L.J.

intimate to him whether we did or did not concur with him, and he abstained from giving judgment himself at length. Speaking for myself, and as I am sure I may also say for Lord Justice *Mellish*, we gave our very best consideration to that case, and in the result we came to the conclusion that Lord Justice *James* had been right in *Ex parte Valpy & Chaplin* (1), and we, therefore, followed his decision. The doctrine of *In re Native Iron Ore Company* (2) therefore cannot be said to rest upon a recent decision, or upon a single decision.

The next class of cases in which, I think, the Court of Appeal is not altogether bound by its previous decisions, consists of cases in which a doubt is entertained by members of the Court who were parties to the former decision. I hope that we are all of us open to conviction, and that, if our attention is drawn to a decision previously given by us, and it is shewn that such decision is even doubtful, there would be a desire on the part of every one of us to have such a case further considered. But up to the present time there does not appear to have been any doubt whatever on the part of any of the Judges who took part in the decisions in which the above rule is laid down. The case of *In re Native Iron Ore Company* was not the first case in which the point came under the consideration of the Lord Justice *Mellish* and myself, for in the case of *In re General South American Company* (3), in which the mortgages or charges had not been registered, but the omission to register was not the fault of the parties entitled to the charge, and where the persons so entitled did not stand in any fiduciary relationship to the company, the same argument was addressed to us as was subsequently addressed to us in the case of *In re Native Iron Ore Company*, where the party omitting to register was a director. We drew in that case the distinction between the two classes of cases. Therefore I may say that this case does not come within the second class of cases in which the Court of Appeal is not, in my opinion, necessarily bound by former decisions, and may fairly have the question re-argued.

The third class of cases is where there is a concurrence of opinion amongst those whose opinions are deserving of considera-

(1) Law Rep. 7 Ch. 289. (2) 2 Ch. D. 345.
(3) 2 Ch. D. 337.

tion outside the Court itself, that the former decisions are questionable. Now, I desire to pay all respect to any view expressed by the Master of the Rolls, but at the present time I am not aware that any expression of dissent from the decisions in any of the cases to which I am referring has been expressed by any other Judge. I think, therefore, that there is not such a general concurrence on the part of others whose opinions are most deserving of consideration against those decisions as to induce this Court to depart from them. Even in cases coming within any of the above classes, it is not the practice of the Court to overrule the decisions of the same Court, happening to be differently constituted, without the assistance of an additional number of Judges.

I assume, therefore, that we are bound now by the decision in *In re Native Iron Ore Company* (1), and pass on to the consideration of the second question, whether the present case can be distinguished from that case. I am bound to say that my present impression is that it cannot be so distinguished, though I am also bound to say that if the decision of the case had rested with me, some of the arguments which have been addressed to us might have made me think it desirable to take further time for consideration. But inasmuch as both of my colleagues are clearly of opinion that this case can be distinguished from the case of *In re Native Iron Ore Company*, I do not think it desirable that judgment should be postponed in order to give me an opportunity of satisfying my mind upon those one or two points into which, though they do not weigh much with me, I might have thought it desirable to inquire further. They, I find, are both of opinion that the decisions in *Ex parte Valpy & Chaplin* (2), and the case of *In re Native Iron Ore Company*, should have been different, I, on the other hand, adhere most distinctly to the principles enunciated in those cases, and think that they were rightly and properly decided. Under these circumstances it is not unnatural that I should take a somewhat different view from them of the circumstances relied on as distinguishing any particular case from those cases. I may possibly be prejudiced, if I may use such an expression, by the views which I entertain of the decision to which I was a party, and thus may take too unfavourable a view of what are called

(1) 2 Ch. D. 345. (2) Law Rep. 7 Ch. 289.

C. A. 1879 SMITH'S CASE.

distinguishing circumstances. But at the present moment I need not say more than that I do not see my way to distinguish this case from that of *In re Native Iron Ore Company* (1).

BRAMWELL, L.J.:—

I am of opinion that this order should be affirmed, and that the appeal should be dismissed. I begin by saying that, in my opinion, we are bound by the two decisions which have been referred to, and that if this case had been within the principle of them, the appeal ought to be allowed. I think that, however, it is distinguishable from them, though I am quite aware of the difficulty of coming to a correct conclusion as to distinguishing circumstances if one does not approve of a decision which is supposed to govern the case. I have very often seen a witness in the box who was suspected of giving dishonest evidence where I was satisfied that he had first deceived himself, and then honestly come forward to deceive others, and it is quite possible that a similar operation may go in the mind of a Judge who does not *ex animo* agree with the decisions bearing on the case before him.

As a general rule I think that where a Judge is bound by an authority it is best not to express dissent from it. I should not like to say that the decision of a Court of co-ordinate jurisdiction ought to be overruled on all the grounds put by Lord Justice *Baggallay*. Where a decision has been founded on manifest error, such as overlooking an Act of Parliament, or a previous decision, or some undeniable fact, and perhaps in other cases, it may be right to overrule it; but as a general rule it is much better that the Court should follow the decisions of Courts of co-ordinate jurisdiction, leaving it to a higher Court to set them right if they are wrong, and should not express dissent or doubt about them. As regards the cases of *Ex parte Valpy & Chaplin* (2) and *In re Native Iron Ore Company*, considering who were the Judges that decided them, it is much more likely that I should be wrong than right in differing from them. It is, however, extremely difficult to apply a case as an authority without ascertaining its principle, and in endeavouring to ascertain the principle it is often very difficult to

(1) 2 Ch. D. 345. (2) Law Rep. 7 Ch. 289.

avoid expressing an opinion on the decision, and in the present case I am driven to say that I do not accede to those two decisions. I think, however, that it is inexpedient to enter into an argument for the purpose of shewing that they were not well founded. All that we have to do is to admit them as authorities, and to extract the principle from them as well as we can, and then to see whether the present case comes within it. I understand their principle to be, that where there is a director or officer of the company whose duty it is to see that mortgages or charges are registered, and he has a mortgage or charge which is not registered, there is a personal disability on his part which prevents him setting up that mortgage or charge.

In order to see whether that principle governs the present case, we must first of all ascertain what the facts are. It is clearly proved that the shares which stood in the name of *Thomas Taylor Smith* were the property of the partnership, *Taylor Smith Brothers*, and that the money paid on them was found by a cheque drawn upon the funds of *Taylor Smith Brothers*. That matter, however, is of very little consequence, except so far as it makes more or less probable the rest of the story. What is of consequence is that the debt due from the liquidated company was a debt to *Taylor Smith Brothers*, and never was due to *Thomas Taylor Smith* alone. That is sworn to by *Thomas Taylor Smith*. It is not improbable in itself, it is corroborated by the circumstance of the cheque being drawn in the way it was, and in the ledger of the company it is treated as a transaction between *Taylor Smith Brothers* and the company.

Then an attempt is made, which I cannot but characterise as one of the most hopeless attempts I ever heard, to shew that although the debt was originally due to *Taylor Smith Brothers* it had somehow become a debt due to *Thomas Taylor Smith* alone; or, at all events, that the security was given to him alone on account of the debt due to *Taylor Smith Brothers*. In order to suppose that the debt became due to him alone you must suppose that his partner or partners had agreed to give up the company as debtors, and that the company agreed to be liable to him instead of his firm, when of this there is not one particle of evidence except that when the loan was renewed *Thomas Taylor*

C. A. 1879 SMITH'S CASE. Bramwell, L.J.

Smith drew the bill in his own name alone. His doing so was the most intelligible thing in the world. In the first place he was the man who managed the business; in the next place, although his pertnership had not ceased to exist in point of law, it had ceased to exist as a going, living, active partnership. I have known repeatedly that men have had a scruple about using a partnership name when the partnership had practically for most purposes ceased to exist. It would have been perfectly competent to him to have drawn in the name of the firm, but he drew in his own name only, and he swears that he did so only because he was the person who managed the affairs of the partnership, and he is not cross-examined on the point. The warrants were indeed handed over to him, but he swears that they were immediately made use of for the purposes of the partnership, that is to say, the store-keepers who got the iron in their possession were directed to hold it as property of the partnership. Under these circumstances to suppose that *Thomas Taylor Smith* is alone concerned in the security seems to me to be absolutely impossible. I am, therefore, clearly of opinion that if there had been any registering of this mortgage or charge it ought to have been a registering in the name of *Taylor Smith Brothers & Co.*

In the next place I wish to call attention to the language of the *Companies Act*, 1862, s. 43, which says that the mortgage shall be registered, and then proceeds: "If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding £50." Now, I should say that *Thomas Taylor Smith* is not within that section, for in my opinion there is no evidence to shew that he has knowingly or wilfully authorized or permitted the omission of such an entry, because those words suppose a *mens rea*, culpable negligence. I can see no evidence of that. If Mr. *Thomas Taylor Smith* were asked why the charge was not registered he would probably say, "I really know nothing about it. There was a register of mortgages kept. I supposed that what ought to be done was done by the proper man, the clerk who kept the books." I, therefore, do not think that he would be liable to the penalty.

The case however has been dealt with as if the words about the penalty were not there. It certainly seems a remarkable thing that the particular penalty of £50 should be imposed by the Legislature, and that the Judges should impose an additional penalty. At all events there would have been as much ground for the decision if those words about the penalty had not been there, for there is no doubt that the words, "Every limited company under this Act shall keep a register, &c." impose a duty upon the company. Whether a mandamus would lie I do not know, the difficulty being who could be entitled to ask for it. I cannot see who it is that would require the entry of the mortgage upon the register. It would not be anybody who is not a director, because it is admitted that the mortgage in his hands is good without registry, and it would not be anybody who is a director, because, of course, he could have it done without a mandamus. Still, there is a direction that the register shall be kept, but that is a direction to the company which must be carried into execution by those who manage the company, that is, the directors. Suppose a director to be absent from illness it is difficult to see that the clause imposes on him an obligation for the non-performance of which he would be in any way liable, but supposing him to be present and acting and attending to the affairs of the company, is the registering his security a duty which is to be performed or the performance of which is to be seen to by him? The decisions in the two cases referred to as governing this section lay down that it is, and that the director or officer who neglects to see it done is under a personal disability to enforce his security.

But this is a case in which it is sought not to visit him only with the consequences of that personal disability, but to visit two other persons as well as himself, and possibly to visit them to the exclusion of himself. It may be that when the partnership of *Taylor Smith Brothers* is wound up, not a shilling will be coming to *T. Taylor Smith*, and that if the iron is taken away for the benefit of the company, his two partners alone will suffer, and that he will not suffer to the extent of one shilling, except in the sense of being under some liability to them. The question is, then, whether they are to suffer for this personal disability of their partner, and I cannot understand why they should. Suppose the

C. A. 1879

SMITH'S CASE.

Bramwell, L.J.

Companies Act had not provided this summary mode of proceeding, the liquidator would, I apprehend, have brought what used to be called an action of trover, an action for the wrongful conversion of the estate, and the Defendant would have said, "The property is not in you." The liquidator's case would have been, "The property is mine." The Defendant's case would have been "No, the property is in me along with two other persons." Could the liquidator have made out any title to the property as against those two? Supposing that before the liquidation they had sold the property and pocketed the money, could the property have been followed into the hands of the vendee? I should hope not. Could the money have been got from the partnership? Again I say I should hope not. I cannot think, therefore, that an action at common law would have been maintainable for the recovery of this property against the partners. If there is a personal disability on the part of *T. Taylor Smith*, why is not an action to be brought against him, saying, "You have by your breach of duty injured somebody, or at all events you have got a benefit which you are personally disabled from getting." That would be a reasonable thing, and that would be a way of getting at the wrongdoer without injuring those who are not wrongdoers. But the claim to get these chattels is a claim of right to damage people who are perfectly innocent, and not a claim to stop their getting to one from whom they would be got back as a wrongdoer. It appears to me, therefore, that the application of the liquidator is not well founded.

As I said before, I may be under a bias to distinguish this case from those referred to, but I have done my best to get at the truth. In the case put by the Master of the Rolls of an insurance company unincorporated, where there are hundreds of partners, it seems to me perfectly monstrous to say that because of the personal disability of one member of the company all the other 999 members are to lose their interest in a security given to the company. It seems to me there is no principle of equity, and I feel confident there is none of law, which would involve this consequence, and that in this particular case, assuming, as I do, the authority of the two cases that have been referred to, if the delinquent director-partner is to be got at all, he must be got at

personally, and not in conjunction with his two partners by their property being taken from them. I think, therefore, that this case is not governed by the two cases cited, and that the appeal should be dismissed.

C. A. 1879 SMITH'S CASE.

Solicitors: *Bower & Cotton; Shum, Crossman, & Crossman.*

CRESSWELL *v.* PARKER.

C. A. 1879 *April* 9.

[1879 C. 44.]

Practice—Service out of the Jurisdiction—Rules of Court, 1875, *Order* XI., *rr.* 1, 1*a*.

On the marriage of an Englishman, domiciled in *England*, with a Scotch lady, a settlement in Scotch form was made of her property, under which, after the death of the wife, the property went to the children of the marriage, subject only to an annuity to the husband. On the death of the wife, the only child of the marriage, an infant, resident with his father in *England*, commenced an action against the trustees to have the trusts administered by the Court, alleging that the trustees improperly refused to allow maintenance out of the income. The trust property was all in *Scotland*, and the trustees all resided there. An order having been obtained for leave to serve the writ upon the trustees in *Scotland*:—

Held, by the Court of Appeal, that, assuming that there was jurisdiction under Rules of Court, 1875, Order XI., rule 1, to allow service of the writ in *Scotland*, still under the discretion given by Order XI., rule 1a, such service ought not to be authorized, as it was more convenient and proper that the trusts of Scotch property held by Scotch trustees upon the trusts of a Scotch instrument should be administered by a Scotch than by an English Court.

Semble, that under Order XI., rule 1, there was no jurisdiction to order service of the writ in *Scotland*.

THIS was an appeal from an order of Vice-Chancellor *Malins* authorizing service of the writ out of the jurisdiction.

On the 22nd of July, 1869, *Richard Cresswell*, an Englishman, domiciled in *England*, intermarried in *Scotland* with *Marion Parker*. On the occasion of this marriage a settlement in Scotch form of property of the wife, amounting to about £10,000, was executed. Four persons, all resident in *Scotland*, were appointed trustees, and the property was settled upon trust after the death of Mrs. *Cresswell* to pay the husband £200 a year, reducible on

C. A. 1879 ~~ CRESSWELL v. PARKER.

his marrying again to £100 a year, and subject thereto for the children of the marriage.

Mrs. *Cresswell* resided with her husband in *England* till her death, which took place on the 28th of March, 1874.

The Plaintiff was the only child of the marriage, and resided in *England* with his father. The trustees were still resident in *Scotland*, and all the trust property was invested in Scotch securities.

On the 24th of January, 1879, disputes having arisen as to the allowance of money for the Plaintiff's maintenance out of the income, which allowance the trustees, it was alleged, refused to make except on conditions as to the residence of the infant of which the father did not approve, the Plaintiff, suing by his next friend, obtained *ex parte* from Vice-Chancellor *Malins* an order for leave to serve on the Defendants in *Scotland* the writ in this action, which was attached to the Chancery Division. The relief claimed was that the Plaintiff might be made a ward of Court, and that the trusts of the settlement might be carried into execution under the direction of the Court; that proper directions might be given for the maintenance of the Plaintiff; that the trust funds might be ordered to be transferred into Court to the credit of the action; that a receiver might be appointed and the present trustees removed and new trustees appointed.

The Defendants gave notice of motion before Vice-Chancellor *Malins* to discharge this order, but owing to the illness of that learned Judge the motion could not be disposed of, and leave was given to bring the case before the Court of Appeal.

Glasse, Q.C., and *Heath*, for the application:—

There is no English element in this case, except that the Plaintiff is resident in *England*. The case does not come within Rules of Court, 1875, Order XI., rule 1, and even if it did, the Court, under the discretion given it by Order XI., rule 1a, would decline to sanction service out of the jurisdiction.

Higgins, Q.C., and *Crossley*, *contrà*:—

This was a settlement made on the marriage of persons who, as it was known, would reside in *England*, and the trustees in refusing to allow maintenance to the Plaintiff are committing a

breach of contract within the jurisdiction, as the payments ought to be made here. The case therefore comes within Order XI., rule 1. The case is one where service in *Scotland* could have been ordered under the old practice: *Drummond* v. *Drummond* (1), and we submit that the Judicature Acts and the Orders do not lessen the power of the Court in this respect. As regards convenience, the infant being within the jurisdiction, it is most convenient that the trust should be administered here.

JAMES, L.J.:—

I think that this is a very clear case. I more than doubt whether we have any jurisdiction to order service on the trustees in *Scotland*. I do not see that there was any contract made in *England*, or any breach in *England* of any contract wherever made, or anything to bring the case within the terms of Order XI., rule 1. That clause was certainly intended to express the only circumstances under which it was to be allowed that a man should be brought from some distant place into an English Court. If the argument of the Respondents is right, and if rules similar to our rules were passed in the state of *California*, and Mr. *Cresswell* chose to take his son to *San Francisco* and live there, the trustees would have to go from *Scotland* to *San Francisco* to render their account there, with possibly the right of appeal to *Washington*.

Here is a Scotch settlement, Scotch property, Scotch trustees, and if it were a matter of judicial discretion where the proceedings ought to be carried on, I think that the Plaintiff ought to go where the Scotch Defendants are, and get them to render their accounts in a Scotch Court, which knows exactly what is the effect of this Scotch settlement, and what is the proper mode of dealing with the trust estate. It is far better that the infant, or the infant's father, should go there than that the trustees should be brought here out of their own country to answer to a Court the name of which I dare say is not very agreeable to their ears. Probably they think that the Court of Session is better than the Chancery Division of the High Court, and being Scotchmen they have a right to their opinion on that subject. They prefer having their Scotch deed construed, enforced, and executed by a Scotch

(1) Law Rep. 2 Ch. 32.

C. A. 1879 CRESSWELL v. PARKER.

Court where they can have their own attorneys and barristers close by them instead of having to come up to *London*. I think the order ought to be discharged.

BAGGALLAY, L.J. :—

I am of the same opinion. The only portion of rule 1 of Order XI. under which it can be argued that the Court has in this case authority to order service of the writ out of the jurisdiction is the third of the several branches mentioned in that rule, namely, "Whenever there has been a breach within the jurisdiction of any contract wherever made." I am not at all satisfied, and as at present advised I do not think there has been any breach within the jurisdiction of this contract made upon the occasion of the marriage. But assuming that it is a case in which the Court has power to direct service of the writ abroad, then the additional rule 1a provides that in exercising that jurisdiction the Court is to have regard to a variety of circumstances, amongst others, to the amount and value of the property in dispute, or sought to be recovered, and to the comparative cost and convenience of proceeding in *England*, or in the place where the Defendant is resident. I think, having due regard to each of these circumstances, that I ought not to come to any other conclusion than that it is more convenient, and in consequence more desirable, that the administration of this trust should be carried out in *Scotland* than in *England*.

BRAMWELL, L.J. :—

I am of the same opinion. As to what are called the general merits, I have no doubt it would be exceedingly hard for these gentlemen to be brought here into an English Court for the administration of the trusts. I should think they ought to be administered according to Scotch notions, not according to English, if they happen to differ. In addition to that I doubt whether there has been anything which can be called a breach within the jurisdiction. And further, if one is to look at the very words, it is not a breach of contract they are charged with, but a breach of duty as trustees, and that, whether intentionally or not, does not seem to have been provided for by the rule. The third remark I

would make is this, that if the conduct of the trustees is looked at as a breach of contract, for which damages are sought to be recovered, there is no claim here for damages.

C. A. 1879 CRESSWELL v. PARKER.

Solicitors: *Phelps, Sidgwick, & Biddle; Carr, Bannister, Davidson, & Morriss.*

In re DYNEVOR, DYFFRYN, AND NEATH ABBEY COLLIERIES COMPANY.

C. A. 1879 *Feb.* 12, 18.

Company—Winding-up—Scheme of Arrangement—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 136, 159, 160—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.

If a scheme of arrangement under the *Companies Act*, 1862, and the *Joint Stock Companies Arrangement Act*, 1870, has received the sanction of the majorities of contributories and creditors required by the Acts, and also the sanction of the Court, it is not material in what order these sanctions have been obtained.

When the arrangement is a fair one, and is likely to be beneficial to al parties, the Court will not be astute to find technical defects in the proceedings.

THIS was an appeal from an order of Vice-Chancellor *Malins*.

The *Dynevor, Dyffryn, and Neath Abbey Collieries Company, Limited*, was incorporated in 1874 under the *Companies Act*, 1862. By a deed dated the 29th of September, 1874, the company assigned the whole undertaking to two trustees to secure the repayment of the mortgage debentures issued by the company, amounting to £210,000.

On the 25th of June, 1878, a general meeting of the company resolved to wind up the company voluntarily, and appointed the two trustees liquidators.

On the 21st of August, 1878, a meeting of the creditors was held by order of Vice-Chancellor *Malins* to consider an arrangement proposed between the company and the debenture holders with the object of granting a lease of the property to Mr. *J. N. Moore*. The meeting was convened by a circular, which mentioned the heads of the proposed agreement for a lease, and the resolution intended to be put to the meeting, and stated that the proposed lease could be seen and would be read at the meeting.

C. A. 1879 — *In re* DYNEVOR, DYFFRYN, AND NEATH ABBEY COLLIERIES COMPANY.

The proposed agreement was made between the two trustees of the first part, the company of the second part, and Mr. *Moore* of the third part; and its principal provisions were as follows:—

It was agreed that a lease of the company's business should be granted to Mr. *Moore* for twenty-one years at a dead or minimum annual rent of £5000 and certain royalties; that the lessee should take all the liabilities of the leases under which the company held the mines; and that the lease should include the plant and machinery belonging to the company; and the lessee agreed to have £10,000 ready to be expended as capital at the commencement of the lease, and to expend so much of that sum as should be required in working the mines, and that he would idemnify the company and the trustees and the secured creditors of the company against all liabilities up to the date of the lease other than the moneys secured by the deed of trust for the benefit of the debenture holders; and it was agreed that the liquidators should assign to the lessee all the assets of the company.

The agreement was expressed to be made subject to the sanction of the Court, and to its being executed as an arrangement with creditors under the *Joint Stock Companies Arrangement Act*, 1870.

At the meeting a majority of more than three-fifths of the creditors passed a resolution approving of the proposed arrangement and agreement, and authorized the trustees to make such modifications in it as they from time to time might think fit. Some modifications respecting the payment of the royalties were introduced by the trustees before the lease was executed, but the alterations were favourable to the company.

The trustees then took out a summons to obtain the sanction of the Court, which was opposed by some dissentient debenture holders. The Vice-Chancellor, being of opinion that the proposed arrangement was beneficial and proper, ordered the trustees to enter into possession of the property of the company, and to execute the lease to be granted in pursuance of the arrangement, and declared that the arrangement and the agreement for a lease were binding upon the debenture holders, creditors, and contributories of the company.

The dissentient debenture holders appealed from this decision.

On the 5th of February, 1879, after the order of the Vice-

Chancellor had been made, a general meeting of the company was held under the 160th section of the *Companies Act*, 1862, at which an extraordinary resolution was passed sanctioning the arrangement and the agreement for a lease.

Bristowe, Q.C., and *H. A. Giffard*, for the Appellants:—

This arrangement has not been sanctioned in the manner provided by the *Companies Act*, 1862, ss. 136, 159, 160, and the *Joint Stock Companies Arrangement Act*, 1870, s. 2. It is necessary that the provisions of the Acts should be strictly adhered to, or else the arrangement is void. The sanction of the contributories, by their extraordinary resolution, was not given till after the order of the Vice-Chancellor. Therefore when the order was procured the provisions of the Act had not been complied with. There were also other irregularities. The debenture holders were all summoned to the same meeting on the 21st of August, 1878, and voted as one body, whereas there were two or more classes of debenture holders who ought to have voted separately. The meeting of the contributories had no power to authorize the trustees to make modifications in the agreement; they ought to have sanctioned or rejected it as it stood.

C. S. C. Bowen, for a contributory holding 14,000 shares, supported the appeal.

J. Pearson, Q.C., and *Romer*, for the liquidators, and

Higgins, Q.C., *Millar*, and *C. B. McLaren*, for other parties, were not called on.

JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case ought to be affirmed. It appears, and, as I understand, it has not been disputed, that this is an arrangement which the great body of the debenture shareholders almost unanimously has sanctioned, and the shareholders with almost equal unanimity have also sanctioned, and as far as we can see the arrangement has been made most carefully and most honestly between the parties. The debenture holders had a committee who looked

C. A. 1879 *In re* DYNEVOR, DYFFRYN, AND NEATH ABBEY COLLIERIES COMPANY. James, L.J.

after their interests; the company had liquidators who looked after their interests; and the Vice-Chancellor directed a meeting of debenture holders to be held, and that meeting was held after due notice, giving every person an opportunity of seeing the lease which was proposed to be made to Mr. *Moore*. Under those circumstances the substance of the thing seems to me to be entirely right.

Now, it is said that the arrangement is not a beneficial one for the debenture holders. [His Lordship then considered the terms of the arrangement, and expressed his opinion that it was a beneficial one for the creditors, and continued:—]

Then it is said that there were certain important modifications of the terms which ought to have been submitted to the further meeting. I see no authority for that under the Act of Parliament, or on any general principle of law or of common sense. The modifications that were made seem to be modifications which were imposed upon the lessee, and in favour of the lessors who were the trustees of the debenture holders, that is to say, the lessee was deprived of a privilege which the debenture holders thought would probably diminish the value of this property, and he was also made to pay an extra royalty for some part of the property, which, being freehold, it was thought he ought to pay. Then it is said that the resolution was not carried in due form. All that is required, as it appears to me, by the Act of Parliament is that the arrangement shall be sanctioned by the company by an extraordinary resolution. That extraordinary resolution has been obtained; the company were in fact themselves applying to the Court for it, and the debenture holders, who are the persons who are complaining, sanctioned it by a resolution carried by more than a sufficient majority. The Court having had its attention called to all the terms of it has sanctioned it, and then, if there was any difficulty from the want of a meeting of the shareholders to ratify what the company had done, that meeting has been held, and that ratification has been obtained. Therefore the whole thing seems to me to be quite right.

Then it is said that the Vice-Chancellor ought not to have made his order until after that meeting. If necessary the order might have been post-dated, but I do not think that was neces-

sary. Every assent that is required has been given to the arrangement, and in what particular order or form those assents have been given seems to me to be wholly immaterial. I think that where there is an honest arrangement, as this appears to me to have been from the first, and everything is manifestly right, the Court ought not to be astute to find out any little technical defect, if there is any, in the proceedings. Therefore I am of opinion that the order of the Vice-Chancellor is right in substance, and I think it is also right and ought to be sustained.

BRAMWELL, L.J.:—

I am of the same opinion. I shall add nothing to what has been said with respect to the technical difficulties which have been made. I will only just observe this, that there was a suggestion, although there was not a particle of evidence to shew it, that a better bargain could have been made for the debenture holders.

BRETT, L.J.:—

The arrangement in this case has been made between the company and a certain class of its creditors, namely, the debenture holders, and the question is whether that arrangement has been come to in accordance with the statute. That arrangement is, that the debenture holders have agreed that the company or the trustees should grant this lease to Mr. *Moore*, and that, instead of being paid in any other way, they should be paid out of the rents and royalties to be procured under the lease. In the first place the statute requires that the arrangement shall be authorized by an extraordinary resolution of the shareholders. That has been done. Then the creditors, who are here the debenture holders, are to be bound by the majority, and therefore, under the Act of 1870, it is necessary that the proper requisites should have been gone through in order to enable the majority to bind the minority. What was required? It was required that certain notices should be given that a certain resolution should be passed, and that the sanction of the Court should also be obtained. But those notices have been given, if they are not bad for the reasons suggested by Mr. *Bristowe*, the resolutions have been passed, and

C. A. 1879

In re DYNEVOR, DYFFRYN, AND NEATH ABBEY COLLIERIES COMPANY.

the sanction of the Court has been obtained. All the requisities therefore have been fulfilled.

The first objection of Mr. *Bristowe* was, that supposing all these things to have been done, each in itself right, yet they were done in the wrong order, and that the order giving the sanction of the Court was made before the extraordinary resolutions of the shareholders of the company. Now, I can see nothing in the statute which makes the order of time in which the proceedings are to be taken imperative. If all three sanctions are actually procured there is no objection because one is made before the other.

But then it is said that the resolution of the majority of the creditors was obtained wrongly, and not in accordance with the Act of 1870. First of all, the objection was that the debenture holders had been summoned in one class, whereas they ought to have been summoned in three classes. I confess that it seems to me that if they had been summoned in three classes and made to vote separately, that that would have been bad, and that the only right way of doing it was to summon them as one class as they are the persons to be bound, and that in that respect the notice and what was done was more right than the mode suggested by Mr. *Bristowe*.

Again, it was said that the notice and the resolution were wrong, because they gave power to make modifications in the lease. To my mind neither the notice nor the resolution enables them to make any essential modification in the substance of this lease; and if there had been any essential modification in the substance of the lease I should have thought that the lease would be bad, and ought not to have been sanctioned by the Court. But it seems to me that the alterations which were made were small alterations, and were in favour of the debenture holders. Therefore they are just the modifications that were authorized by the resolution, and the matter cannot be said to be bad upon that ground. It seems to me, with deference, that all the objections taken by Mr. *Bristowe* on behalf of his client are hypercritical, and do not do away with the power of the Court which made this order, and that the order was right.

Solicitors: *A. H. Miller; Ashurst, Morris, & Co.; Norton, Rose, & Co.*

MULLINER *v.* MIDLAND RAILWAY COMPANY.

M. R.
1879
Jan. 21.

[1877 M. 231.]

Railway Company—Alienation of Land not being "Superfluous Land"—Lands Clauses Act, 1845, *s.* 127—*Railways Clauses Act*, 1845, *s.* 45—*Station built on Arches—Right of Way under Arch—Working Agreement—Words "manage, work, and use" Railway and Works—Claim by Purchaser of alleged Right of Way.*

A railway company, having the usual powers under their special Act to take and use land for the purpose of the railway and works, cannot, whether for valuable consideration or otherwise, alienate for any purpose except the purposes of the Act any portion of its land, not being "superfluous land" within sect. 127 of the *Lands Clauses Act*, 1845, and not being land taken for extraordinary purposes within sect. 45 of the *Railways Clauses Act*, 1845, nor any easement over the same.

Where a railway station is erected on arches on land thus taken, the part of the land under the arches is not "superfluous land" within sect. 127 of the *Lands Clauses Act*, 1845.

The *B. Railway Company*, having, under their Act, acquired land, constructed their railway, and erected a station which was partly built on arches, sold to their contractors their superfluous land, and also purported to convey to them without consideration a right of way under one of the arches leading to part of the land so sold though not being a way of necessity thereto. The contractors sold the land and alleged right of way to the Plaintiff.

The *M. Railway Company* were, under the said Act, to enter into a working agreement with the *B. Railway Company*, the terms of which were embodied in the schedule to the Act, whereby, after the line was opened, the *M. Railway Company* were "to manage, work, and use" the railway and works, and to develop the traffic. This had been carried out. The *M. Railway Company* now required the arches under the station as warehouses for bonded goods, and the arch in question as a closed yard for loading and unloading such goods. In an action by the Plaintiff to restrain the *M. Railway Company* from interfering with his right of way:—

Held, that the alienation of the right of way under the arch was *ultrà vires*; that the *M. Railway Company* were entitled to use the land under the arch in the way proposed; and that, their title being prior to that of the Plaintiff, who must be taken to have notice of the company's rights, his action could not be sustained.

THIS was an action to restrain the Defendant company from interfering with the Plaintiff's alleged right of way through an archway under part of the railway station at *Northampton*.

By the *Bedford and Northampton Railway Act*, 1865 (which

M. R. 1879 MULLINER v. MIDLAND RAILWAY CO.

incorporated the *Lands Clauses Act*, 1845, and the *Railways Clauses Act*, 1845), the persons therein named, and all other persons who had subscribed or should subscribe to the undertaking, were united into a company for the purpose of making and maintaining the railway to be called the *Bedford and Northampton Railway*, and for other the purposes of the Act, and for such purposes were thereby incorporated by the name of the *Bedford and Northampton Railway Company*, with power to purchase, take, hold, and dispose of lands and other property for the purposes, but subject to the restrictions of the Act.

The expression "railway" used in the Act was by the interpretation clause defined to mean "the several lines of railway and works by this Act authorized."

The 19th section provided: "The company, by agreement, from time to time may purchase any quantity of land, not exceeding in the whole ten acres, for any of the extraordinary purposes specified in the *Railways Clauses Act*."

The 20th section provided: "Subject to the provisions of this Act, the company from to time may enter upon, take, and use, and appropriate all or any of the lands defined on the deposited plans and described in the deposited books of reference, and may make and maintain the several lines of railway and works by this Act authorized in the said lands, and, so far as the lines and levels thereof are shewn on the deposited plans and sections, may make and maintain the same with the lines and levels so shewn."

The 21st section provided that the several lines of railway and works by the said Act authorized to be made and maintained by the company should comprise the several railways and works thereinafter mentioned, "with all proper and sufficient stations, approaches, works, and conveniencies connected therewith respectively."

The following sections related to a proposed working agreement between the *Bedford and Northampton Railway Company* and the *Midland Railway Company*:—

Sect. 64. "The heads of arrangement set forth in the schedule to this Act are by this Act confirmed and shall have full effect according to the terms and intent thereof."

Sect. 65. "The company" (meaning thereby the *Bedford and*

Northampton Railway Company) "on the one hand, and the *Midland Railway Company* on the other hand, from time to time may make and carry into effect agreements and arrangements with respect to all or any of the following purposes, (to wit)

"The maintenance, working, and use by the contracting companies, or either of them, of the railway or any part thereof;

"The management, collection, conveyance, and delivery by the contracting parties of the traffic and the supply of the rolling or working stock;

"The levying and collection of the tolls, rates, and charges," and the division of the receipts and the rent and other payments under the contract.

The heads of arrangement between the two companies were set forth in the schedule to the Act, and provided by clause 2, that the *Bedford and Northampton Railway Company* were to make and complete the "railways, stations, buildings, and works" authorized by the Act; and, by clause 3, as follows:—"After the *Bedford and Northampton Railway* is authorized to be open for public traffic, the *Midland Company* at all times at their own expense to maintain, manage, man, stock, work, and use the *Bedford and Northampton Railway*, and to work and use the same so as properly to develop and accommodate, not only the through traffic, but the local traffic of the district."

There was no power given by the Act in express terms to grant a right of way over the land taken for the railway.

The heads of arrangement were modified by a subsequent memorandum of agreement in certain particulars not affecting the provisions before set forth.

The *Bedford and Northampton Railway Company* made the railway and works authorized by the Act of 1865 (as varied by two subsequent Acts of 1866 and 1867 in manner not material to be here stated), and for the purposes of their Acts they purchased a site at *Northampton*, on which part of their lines of railway and works were made, consisting of a station with the requisite platforms and other conveniences, and the lines of rails passing through such station, and as the level of the railway when it traversed the said piece of ground was considerably higher than the level of the surface of the ground, the line of railway was

M. R. 1879 MULLINER v. MIDLAND RAILWAY CO.

carried across it, and the station works were constructed partly on an embankment and partly on arches of masonry built at right angles to the railway, and were within the limits of deviation.

Upon the completion of the railway, the contractors, Messrs. *Clark & Punchard*, agreed to purchase from the *Bedford and Northampton Railway Company* the superfluous lands. There were two portions of land near to the station, which were, as was alleged, superfluous lands within the meaning of the Acts, one lying to the north of the line of railway and abutting on *John Street*, and the other to the south, abutting on *Bridge Street*.

By an indenture dated the 20th of August, 1873, and made between the *Bedford and Northampton Railway Company* of the one part, and *Clark & Punchard* of the other part, for the consideration therein mentioned, the company purported to grant and convey to *Clark & Punchard*, their heirs and assigns, the said two portions of land; and also, but without consideration expressed, the company purported to grant to *Clark & Punchard*, their heirs and assigns, and all lessees, tenants, and other persons for the time being occupying or having any interest in the hereditaments thereby conveyed, or any part thereof, a right of way either on foot or with horses, carts, or other conveyances to pass and repass over and along two roads marked on the plan annexed to the said indenture, as "Occupation road D to E," and "Right of way G to F."

By an indenture of the 11th of November, 1876, for valuable consideration as therein mentioned, *Clark & Punchard* purported to convey the said portions of land and alleged rights of way to the Plaintiff. The road called "Right of way" on the plan passed under the line of railway through an archway formed by one of the arches on which the line of railway and works were carried, and formed, as the Plaintiff alleged, a convenient and valuable means of access between *John Street* and the piece of ground to the south of the railway which was conveyed to the Plaintiff. The Plaintiff alleged that from the time of the conveyance to him till shortly before the action was commenced the said road had been uninterruptedly used and enjoyed by him for the purposes of such access.

The Defendant company had, since the completion of the

railway, been in occupation of the railway station and works, and worked the traffic over the line.

The Defendant company having threatened to stop up the said archway, the present action was brought. The Plaintiff alleged that neither the possession nor the use by the Defendant company of the archway was necessary for the efficient working of the line, or any of the other purposes of the heads of arrangement between the companies, and claimed, first, a declaration that he was entitled to the free and uninterrupted right of way over the said road through the archway for the purposes of access between *John Street* and the land on the south side of the railway; secondly, damages for the obstruction of the said way; and, thirdly, that the Defendant company might be restrained by injunction from obstructing or interfering with the free passage of the Plaintiff or his agents along the road through the archway.

The Defendant company by their statement of defence alleged that the grant or alienation of a right of way over the site purchased for the station was inconsistent with the rights of the Defendant company to the use of the site for the purposes of the railway, and the development and accommodation of the traffic, and no such grant or alienation of a right of way could be a grant or alienation of a superfluous interest in land of the *Bedford and Northampton Railway Company* without the consent of the Defendant company, which consent had not been given.

They further alleged that the Plaintiff had notice at the time of his purchase that the vendors could confer no title to the alleged "right of way" as against the Defendant company, and that the Defendant company had never acquiesced in the user thereof by the Plaintiff as of right.

The Defendant company claimed a right to prevent the Plaintiff and persons passing to and from his lands from so using the "right of way" as to hinder or interfere with the management, working, and use of the railway by them.

It appeared that some of the arches under the station were partly used by the Defendant company for goods which were warehoused temporarily, and some were let on short terms; that they now required two of these arches as bonded warehouses for the purposes of their traffic, wherein goods on which duty was

M. R. 1879 MULLINER v. MIDLAND RAILWAY CO.

payable might be stored; that for this purpose it was necessary, in order to satisfy the requirements of the Board of Customs, that the warehouse should be locked up; and, further, that the arch in question was wanted as a closed yard for loading and unloading these goods and turning the waggons; that there was no other part of the station which could be adapted for the purpose, and that it was necessary that the public should be entirely excluded.

At the trial, Mr. *Allport*, the manager of the Defendant company, gave evidence to the effect that the object of providing for the accommodation of these goods would be best effected by closing the arch in question and forming a yard underneath it, where the waggons for the goods might load and unload, and discharge their contents or load from the bonded warehouses. He stated that the original design had been to construct the station on an embankment, but that had been abandoned at his own suggestion, in order that when built on arches, those arches might serve as warehouses for goods.

Chitty, Q.C., and *Dryden*, for the Plaintiff:—

The Plaintiff claims the right of way through the archway in question under the conveyance to him from the contractors, to whom the right of way was granted by the *Bedford and Northampton Railway Company*. That company had purchased, under the provisions in their Act, the land on which the station at *Northampton* was erected, and they had the ordinary rights of owners in fee to dispose of such part of the land as was not required for the purposes of the railway. The road under the arch was clearly not required for the station or for the ordinary purposes of the line, and the right of way claimed by the Plaintiff would in no way interfere with the working of the line. It appears that the purpose for which the Defendant company intend to use this arch is that of a yard for warehouses for bonded stores. This is not a user contemplated by the Act under which the land was taken.

Further, we contend that the land under the arch was superfluous land, which, under sect. 127 of the *Lands Clauses Act*, 1845, the *Bedford and Northampton Railway Company* were empowered to dispose of. At any rate, it may be regarded as an easement

within the words "superfluous lands," as they are to be understood in the Act, for by the interpretation clause it is provided that the word "lands" shall extend to "lands, tenements, and hereditaments of any tenure." The Plaintiff, claiming under the contractors, to whom, as we contend, the right of way was properly conveyed, is entitled to retain the same as against the claim now set up by the Defendant company.

Davey, Q.C., and *W. Phipson Beale*, for the Defendant company, referred, in the course of the argument for the Plaintiff, to *Bostock* v. *North Staffordshire Railway Company* (1).

JESSEL, M.R.:—

I shall not trouble you, Mr. *Davey*.

This case raises two questions, the one an important question of general law, and the other affecting not only these parties, but a great many others similarly circumstanced, though it can hardly be called a question of general law.

The first question, though it turns upon the terms of the special Act of Parliament, is still general law, because I believe those terms are substantially, if not *verbatim*, the same in all similar Acts.

Again, as regards the second question, relating to the right of user of the railway company, though of course it turns on the actual expressions used in the agreement, still, as the words used are so common, and there is so little specialty about them, there again they may fairly be considered to be the words ordinarily used in similar agreements. Therefore, on both points the matter has an importance far beyond the decision of the actual case between the parties.

[His Lordship, after referring to the material sections of the *Bedford and Northampton Railway Act*, 1865, and to the working agreement as set out in the schedule to the Act, continued:—]

It appears that the contractors of the line, who had for value agreed to purchase from the railway company their superfluous lands, obtained from the railway company a deed of grant, by which the company not only conveyed certain superfluous lands,

(1) 3 Sm. & Giff. 283; 4 E. & B. 798.

M. R.
1879
MULLINER
v.
MIDLAND
RAILWAY CO.

some of which lie on the one side of the station, and some on the other, to the contractors, but also purported to grant to the contractors two rights of way (one called an "occupation road," and the other a "right of way," for the sake of distinction) over a portion of the land included within the station, so as to give access to the land so granted. There was no consideration for the grant of the rights of way, nor was the one in question a way of necessity, because the piece of land to which it led abutted on a public highway or street called *Bridge Street*, to which a ready access might have been obtained.

The contractors appear to have sold the lands, together with these rights of way, to the Plaintiff, who, it is not denied, had notice of the rights of the *Midland Railway Company* under the Act of Parliament. The *Bedford and Northampton Railway Company* having delivered possession, under the agreement, of the railway to the *Midland Railway Company*, the *Midland Railway Company* assert that the Plaintiff has no right of way under the Act, and threaten to obstruct it; and this action is brought by the Plaintiff asking for an injunction to restrain the company from so obstructing it.

The station at *Northampton*, which is of course part of the railway (and I may mention it is not only in this case, but as a general rule, actually within the limits of deviation, and is strictly and technically a part of the railway and part of the railway works), is also mentioned in the terms of the contract for the user by the *Midland Railway*, and by the second clause the words are "railway stations, buildings, and works authorized by this Act." Of course "railway and works" include it, but it is actually mentioned under the words "stations and works."

This station is, it seems, to a great extent, erected on arches. The arches below are utilised at present to some extent, but not wholly, for the purposes of the traffic in this way—that goods which are to be carried along the line are warehoused temporarily under them. Some of the other arches are now let on short terms to persons who use them, but the one under which the right of road in question passes is an open arch, through which the Plaintiff has hitherto had access, under his alleged grant of a right of way; and the *Midland Railway Company* desire to stop it up and to

convert it into a yard for some bonded warehouses, and, in accordance with the requirements of the Board of Customs, propose to lock up the arch in question on the further side, so as to prevent all access to it. If they do this, of course the Plaintiff will have no right of way at all, nor will anybody else.

The first point to be considered, which is one of general law, is this: Has a railway company any power by law to alienate, either for value or without value, any portion of the land actually used for the railway or works? It appears to me that, whether we look at the terms of the Act of Parliament, or the general policy of the law, or one express decision upon the subject, a railway company possesses no such power, unless of course it is conferred upon it by special enactment.

First, we must consider what the railway company is empowered to do. It is to make a "railway." I use the term in the Act of Parliament. The definition is "railway and works," which include the station. The station of course is a work, and is a part of the railway. This is a case in which the railway comes into the station as it generally does. It is part of the works of the railway itself within the limits of deviation; and it is used merely for the purposes of the railway. It is not the less a station because it is built on arches, nor is the land below less used for the station because it supports the arches on which the upper part of the station stands. The whole thing—the land below the arches, and the pavement, works, and passenger station above the arches—all form the railway station, and is, according to the definition, part of the "railway and works."

Now, for what purpose is that to be used? It is to be used for the purposes of the Act, that is, for the general purposes of a railway. It is a public thoroughfare, subject to special rights on the part of the railway company working and using it. But it is in fact a property devoted to public purposes as well as to private purposes; and the public have rights, no doubt, over the property of the railway company. It is property which is allowed to be acquired by the railway company solely for this purpose, and it is devoted to this purpose.

It would be a very odd thing, even if there were no enactment to the contrary, to allow a corporation formed to hold land for a

M. R. 1879 MULLINER v. MIDLAND RAILWAY CO.

special purpose, and to take that land compulsorily from the owners only for that purpose, to devote the land to another purpose, or to alienate the land generally under any notion of the ordinary rights of an ordinary proprietor. But when I look to the actual terms of the Act of Parliament, I think there can be no question that what we should expect to find expressed there is clearly expressed.

The railway company is to be a body corporate, and to have power "to purchase, take, hold, and dispose of land for the purposes, but subject to the restrictions of this Act," so that they can only dispose of land for the purposes of the Act.

Now, of course a gratuitous disposition could never be for the purposes of the Act. There might be cases in which it might be alleged that a disposition for value might, under certain circumstances, be for the purpose of the Act; but under no circumstances could a gratuitous disposition be so. Nor could, as I read the Act of Parliament, a sale of the railway be a purpose of the Act. Indeed, when we look at the powers which the company had to take land at all, we shall find in the 20th section, that, "subject to the provisions of this Act, the company from time to time may enter upon, take, and use, and appropriate all or any of the lands defined on the deposited plans." The provision in this Act is not that they shall take lands and sell them, unless you find a special provision for this purpose; besides which, by the 19th section, you find they have power to take ten acres for extraordinary purposes. There is no provision in that Act enabling the company to do more than use the lands for the purposes of the railway, except so far as the *Railways Clauses Act* and the *Lands Clauses Act* are incorporated.

Now, in the *Lands Clauses Act* there is a section of great importance, namely, the 127th section, relating to superfluous lands; and one part of the argument addressed to me was that the land under the arch might be treated as superfluous land, or at all events that the right of way granted might be treated as being an easement within the term "superfluous land;" that the word "lands" included, by the definition of the Act, all easements and other hereditaments. It appears to me quite impossible that this can be so. The preamble to the section is this: "And with respect to

lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows." Now, it is quite plain that all the land under the station is "required for the purposes thereof," not only for the support of the arches, as regards the portions of it actually beneath the piers of the arches, but also that which is under the top of the arches is required, and although the actual surface of that piece of land is not utilised for the moment, it might be utilised at any instant by the arch subsiding or tumbling in, or any other purpose, for you would then put scaffolding or supports upon that part of the land.

It is quite plain, therefore, that the land cannot be treated as land not required for the purposes of the railway. It is an integral part of the station. But, besides that, when we look at the words of the section we see that this cannot be superfluous land: "Within the prescribed period, or, if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands and apply the purchase-money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

Of course you can never suppose that the Legislature intended to take away what I will call the base of the arch, or that which underlies even the crown of the arch, as being not wanted in any event for the purposes of the undertaking. It is, in my opinion, quite an inadmissible contention.

Again, under sect. 45 of the *Railways Clauses Act* there is a power to take land for "extraordinary purposes," and a power of selling the land which shall be so taken. The prescribed number of acres in the present Act is ten acres; and it is for the purpose, amongst other things, of additional stations, and convenient roads and ways. There is a power to sell the land which they so take; but beyond those two powers, there is no power of selling, that I can find.

M. R.
1879
MULLINER
v.
MIDLAND
RAILWAY CO.

The argument was used that, as the company took the property in fee, they have the ordinary rights of fee simple proprietors; but even that is not so. It is not necessary now to go fully into that point, because the right of selling they clearly have not. As I said before, they have only to hold it for the purposes of the special Act. They can only dispose of it for the special purposes of the Act; and the very fact that they have special powers of sale over other lands, which would be wholly unnecessary if they could sell the land used for the railway and works, shews that they cannot sell this land.

It is, moreover, a mistake to suppose that they themselves have the ordinary rights of proprietors in every respect to use the lands. Their rights, no doubt, are limited, though it is not necessary to state the exact limits. That point came before the Court of Queen's Bench in the case of *Bostock* v. *North Staffordshire Railway Company*, which is not really distinguishable from the present case. It has been reported, once before the Vice-Chancellor *Stuart* (1), and also before the Court of Queen's Bench (2). There the majority of the Court of Queen's Bench were clearly of opinion, though the words there were "for the purposes of this Act and for no other purpose," which words, as I said before, are implied without being expressed, that the company could not use the land except for the purposes of the Act. They had not the ordinary rights of ordinary proprietors, but the Legislature empowered them to acquire and hold and use the lands merely for the special purposes of the Act.

This is no new doctrine, at all events in an Equity Court, for we have very many instances of corporations with limited powers of enjoyment, limited powers of alienation, and limited rights of control over their property. One large mass of corporations must occur to the minds of every one—I mean the ecclesiastical corporations, sole or aggregate. As regards ecclesiastical corporations sole, it was long since decided as to rectors, vicars, and others, that though, in a certain sense, owners in fee simple, yet in many respects they had only the powers of tenants for life. Of course no owner in fee simple can actually enjoy beyond his life; and therefore to that extent they were no better and no

(1) 3 Sm. & Giff. 283. (2) 4 E. & B. 798.

worse off than other owners in fee simple. But it was said that, being seised in right of their churches, they had not the ordinary powers of other proprietors in fee simple, and such powers as opening mines, and so on, were denied to them, and they were not allowed to use their property in the same way as ordinary owners of land.

Then a large body of corporations, with which the old Court of Chancery had a great deal to do, but with which the High Court, I am happy to say, has not so much to do, there being Charity Commissioners appointed to do a great part of that work—namely, charity corporations, had, as we all know, very limited powers of disposing of their land. Since the *Municipal Corporations Act* we have a number of other corporations, namely, municipal corporations, who have also restricted ownership and restricted rights.

Therefore, there is nothing at all new or remarkable in the fact that the railway company has only these restricted and limited rights. It appears to me quite impossible that the railway company can have a right either to sell, grant, or dispose of this land, or of any easement or right of way over it, except for the purposes of their Act, that is to say, with a view to the traffic of their railway. This being my opinion, it would dispose of the Plaintiff's case on the ground of general law being against him.

But now I come to the next point, which is a very important one, and that is the right of a railway company which uses another railway company's property under a working agreement. Now, the user in this case is for the purposes of the traffic, either present or future; including the development of the through and local traffic. What the *Midland Company* say is, in effect, this: "We now require two of these arches for the purpose of bonded warehouses to be used for the purposes of our traffic. We have been applied to by traders on the line to enable them to store their dutiable goods in bonded warehouses temporarily, when they require either to be sent from *Northampton* or to *Northampton*." This is quite a legitimate object, and one which the directors of the railway company wish to comply with. They further say, that in order to do this the bonded warehouses must be locked up and so secured as to satisfy the Board of Customs, who of course are very particular upon this point, because they must be very

M. R. 1879 MULLINER v. MIDLAND RAILWAY CO.

careful that the goods do not get out without the duty being paid, and the reasonable requirements of the Board of Customs must be complied with in this respect before bonded warehouses can be established. They further say that there are no warehouses at the top of this station. The only warehouses they could get would be from the use of the arches at the bottom, and in addition to locking it up they want space, which can only be conveniently afforded under the arch for loading and unloading goods and turning the waggons.

All that appears to me quite reasonable, and entirely within the purview of the agreement. These arches are a part of the station. They were in fact, as we were told in evidence, built for the very purpose, and it seems reasonable to say that, if the company are to use these arches for warehouses, they should want to utilise one of the arches as a yard for the purpose, which I understand to be a legitimate use of this arch. It is also quite reasonable to exclude the public from the right of way over the company's yard, which would be very inconvenient and might lead to robbery; besides, the unrestricted admission of the public would interfere with the ordinary conduct of the business of the railway. It seems to me that those who have granted to the *Midland Railway Company* the right to use the station for traffic purposes have granted to them the right to use the land under the arch in the way I have mentioned, including in that right of user the right of excluding the public from access, which means the right of exclusive user.

That being so, their title being prior to the Plaintiff's, and he having purchased with notice of that title, it appears to me that he has no right to call upon this Court to interfere in his favour with that exclusive and reasonable user by the *Midland Railway Company;* and on this ground also his action fails.

Solicitors for the Plaintiff: *J. Whitehouse*, agent for *H. & H. Markham, Northampton.*

Solicitors for the Defendant Company: *Beale, Marigold, Beale, & Groves.*

SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY COMPANY *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

M. R.
1879
March 25, 27.

[1878 S. 372.]

Railway Company—Working Agreement—Powers to "maintain and work"—Right of Exclusive Possession and Maintenance in Working Company—Improvements included in Powers of Maintenance.

The *S. Railway Company* were authorized by their Act to "make and maintain" a railway, with all proper stations, approaches, and works, and were empowered to transfer or sell the railway before or after completion, and all the powers of the company, to the *D. Railway Company*. By a working agreement, the terms of which were incorporated in the Act, it was provided that the *S. Company* were to complete the line, and that, when completed, it should be maintained and worked by the *D. Company* in perpetuity, and that they were to pay an annual sum to the *D. Company*. On the completion of the line the *D. Company* took possession of and worked the same under the agreement, but no sale to them of the railway had been effected. While the *D. Company* was thus in possession the *S. Company*, acting under the alleged powers in the Act, in order to provide a better access to a station on the line, erected some stone steps in the station yard, which the *D. Company* removed. In an action for a mandatory injunction to compel the *D. Company* to restore the steps:—

Held, that, on the true construction of the Act and working agreement incorporated therewith, the *D. Company* were entitled to the exclusive possession and right of maintenance of the railway and works; and that the erection of the steps was a work of maintenance, and was a wrongful act on the part of the *S. Company*.

Under power to "maintain" a railway and works, reasonable improvements, consistent with the purpose of the undertaking, are included.

BY the *Sevenoaks Railway Act*, 1859, a company was incorporated by the name of the *Sevenoaks Railway Company* to make a railway from a junction with the line of the Defendant company to the town of *Sevenoaks*.

By the *Sevenoaks, Maidstone, and Tunbridge Railway Act*, 1862, the name of the company was changed to that of the *Sevenoaks, Maidstone, and Tunbridge Railway Company*, who were the Plaintiffs in this action, and they were authorized to make and maintain the several railways therein mentioned, called extension railways, and to raise capital with the usual powers.

M. R.
1879
SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO. v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

By Acts passed in 1864 and 1867 the Plaintiff company were authorized to raise further capital, and the time for the completion of the extension railways was extended for three years.

By an Act passed in 1870 the Plaintiff company were authorized to make the deviation or substituted railway therein mentioned, and that the same should be part of the extension railways. By the same Act it was provided that after the completion of the extension railways, being the uncompleted portion of the railways authorized by the Act of 1862 between *Otford* and *Maidstone*, and the deviation or substituted railway and junction railway authorized by the Act of 1870, the Defendant company should in certain events work the same in such manner as should be determined by the arbitrator therein named.

The *Sevenoaks, Maidstone, and Tunbridge Railway Act*, 1872, which was an Act for conferring further powers upon the Plaintiff company, and for authorizing arrangements between them and the Defendant company, after reciting the before-mentioned Acts, recited that the arbitrators appointed under the *London, Chatham, and Dover Arbitration Act*, 1869, by their award, had determined that the agreements between the two companies were invalid, also that from the 30th of June, 1870, the Plaintiff company should be charged with the actual cost of the maintenance and working of the railway of the company; that the local traffic receipts of the railway should belong to the Plaintiff company, and the traffic receipts from and to any portion of the system of the Defendant company should be divided between the two companies according to mileage, and that the actual cost of maintenance and working should be deducted from the aggregate amount of the traffic receipts to be allotted to the Plaintiff company, and the balance paid to them by the Defendant company as in the award provided. The same Act also recited that it was expedient that the Plaintiff company be authorized to make the deviation or substituted railway authorized by the Act, and to abandon the construction of so much of one of the railways authorized by the Act of 1862 as should be rendered unnecessary by the making of the substituted railway; also that terms of arrangement between the Plaintiff company and the Defendant company had been agreed upon (a copy of which was set forth in the schedule to the Act) and that

it was expedient that the same be confirmed; also that it was expedient for the interest of the two companies and the public that provision be made for authorizing a sale and conveyance of the undertaking, railways, works, property and powers of the Plaintiff company to the Defendant company.

The provisions of the Act, so far as material, were as follows (the words "the company" in the Act meaning the Plaintiff company, and the words "the *Dover Company*" meaning the Defendant company):—

Sect. 4: "Subject to the provisions of this Act the company may make and maintain in the line, and according to the levels shewn on the deposited plans and sections, the deviation or substituted railway hereinafter described, with all proper stations, approaches, works and conveniences connected therewith." (The railway referred to in and authorized by the Act was then defined.)

Sect. 5: "The deviation or substituted railway shall be completed within three years from the passing of this Act, and on the expiration of that period the powers by this Act granted to the company for executing the railway or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as shall then be completed."

Sect. 15: "The terms of arrangement set forth in the schedule to this Act are hereby confirmed, and the same shall be in all respects as fully as if the same were set forth at length and enacted in the body of this Act binding on the company and on the *Dover Company*."

Sect. 16: "The company from time to time may transfer or sell and convey all or any part of their undertaking, railway, stations, works, property, &c., and either before or after completion, and also all the powers of the company, except only the powers for the regulation of their internal affairs, to the *Dover Company*."

Sect. 18: "If and when any transfer or any sale or conveyance by this Act authorized is made to the *Dover Company*, then the *Dover Company*, with respect to the premises transferred or sold and conveyed, may exercise and enjoy all the rights, powers, privileges, and authorities, and shall be subject to the obligations, liabilities, claims and demands, of the company, whether with

M. R.
1879
SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO. v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

reference to the purchase and sale of lands and other property, or the execution of works or otherwise howsoever."

Sect. 21 provided that if any transfer or sale and conveyance should be made of the undertaking, railways, and property of the company, then the company should proceed to wind up their affairs.

Sect. 24: "Except only as is by this Act otherwise expressly provided, everything before the time of the dissolution of the company done, suffered, and confirmed under or by the recited Acts, or any of them, shall be as valid as if the dissolution had not happened, and the dissolution and the operation of this Act shall accordingly be subject and without prejudice to everything done suffered, and confirmed, and to all rights, liabilities, claims, and demands which, if the dissolution had not happened, would be incident to or consequent on everything so done, suffered, and confirmed."

Sect. 30: "Except as is by this Act otherwise expressly provided nothing in this Act contained shall take away, lessen, prejudice or affect any of the estates, rights, privileges, powers, or authorities of the company, or of the *Dover Company,* or either of them, under the recited Acts, or under the award, or any of them."

The schedule referred to in the Act contained the terms of arrangement between the Plaintiff company, in these terms called "the company," of the one part, and the Defendant company, in these terms called "the *Dover Company,*" of the other part. The terms, so far as material, were as follows:—

"1. The company shall forthwith construct and complete their authorized line from *Otford* to *Maidstone* with the authorized deviations (in the terms called "the *Maidstone* line") as a single line, with all necessary stations, sidings, turn-tables, and other works and conveniences to the satisfaction of the *Dover Company;* and the same, when so completed, shall be maintained and worked by the *Dover Company* in perpetuity, under and according to these terms and so as fully and fairly to develop the traffic thereon.

"2. For the payment of the costs, charges, and expenses referred to in the last section of the Act, to which these terms of arrangement are scheduled, and for the purpose of the purchase

of land for, and the construction and completion of, the *Maidstone* line, and for the costs incidental thereto, as well as the general expenses of administering the affairs of the company, the directors of the company shall from time to time issue an amount not exceeding £200,000 of the capital of £300,000 referred to in the said Act, as shall be requisite for the purpose.

"3. The company shall not at any time exercise any power of borrowing on the security of the *Maidstone* line.

"4. The *Dover Company* shall provide, and, if need be, annually pay the sum of £9000 for the payment of interest on the stock issued by the *Sevenoaks Company*, in accordance with these terms, and such sum of £9000 shall be payable and be paid from the day on which the said *Maidstone* line shall be completed as aforesaid.

"5. The sum provided for by the last preceding clause to be from time to time provided and paid by the *Dover Company* (in these terms called the 'contribution of the *Dover Company*') shall be deemed to become payable from day to day, but shall be paid at the same time as the interest on the *Dover Company's* Arbitration Debenture Stock is paid.

"6. The contribution of the *Dover Company* shall be a charge on the undertaking of the *Dover Company*, next after the interest on their existing debenture stocks.

"7. The contribution of the *Dover Company* shall be repaid to them out of the net earnings of the *Maidstone* line, and any deficiency in that behalf of those earnings in any year shall be a charge on the net earnings of that line in every subsequent year until the same is fully paid.

"8. The *Dover Company* shall be entitled to retain out of the gross earnings of the *Maidstone* line the actual cost of working the same, including the expense of maintenance and management, payments for passenger duty, and other taxes, rates, and tithes.

"9. The gross earnings of the *Maidstone* line shall be applicable and applied in the manner and with the priorities following, and not otherwise:—

(1). In payment to or retention by the *Dover Company* of the actual cost of working the same as hereinbefore provided.

(2). In repayment to or retention by the *Dover Company* of their contribution, and of any sum or sums which may for

M. R.

1879

SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO. v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

the time being be due to them under Article 7 of these terms.

(3). In payment of the residue then remaining to the company for their own benefit.

"10. If and whenever the development of the traffic upon the *Maidstone* line shall be such as to require any extension or enlargement of the station, or other necessary accommodation thereon, the *Dover Company* will execute such works as, failing agreement between them and the company as to the nature and extent thereof, may be determined by arbitration in manner hereinafter provided; and they shall be entitled to deduct from the gross earnings of the line, and as part of the actual cost of working, a sum equal to £5 per cent. per annum on the capital expended by them for such purposes.

"11. The traffic receipts accruing from traffic passing to and from the *Maidstone* line from and to any portion of the system of the *Dover Company* shall be divided between the company and the *Dover Company* by actual mileage after deduction of terminals."

By the *Sevenoaks, Maidstone, and Tunbridge Railway Act*, 1873, the amount payable by the Defendant company under clause 4 of the said terms of arrangement was increased from £9000 to £9500.

The Defendant company, who at the date of the terms of arrangement were in possession of and working the undertaking of the Plaintiff company, entered and took possession of the new line from *Otford* to *Maidstone* as soon as it was completed, and continued in possession of it under the said terms, paying in each year the sum of £9500.

In April, 1878, the Plaintiff company at the request of the *Maidstone* Local Board, but without the permission of the Defendant company, caused some stone steps to be erected against the terminal station at *Maidstone* of the said railway, and in the station yard, with the object, as they alleged, that a more ready and convenient access might be provided for the public, the steps being deemed necessary for the due completion of the station and the approaches thereto.

In August, 1878, the Defendant company caused the steps to be

removed, whereupon the Plaintiff company brought their action, claiming a declaration that the Plaintiff company were, as between themselves and the Defendant company, entitled to erect and construct the steps leading to the station, and were entitled to the reasonable and proper use of the steps without any obstruction or interference on the part of the Defendant company; also, that the Defendant company might be ordered to restore the steps to the same state that they were in prior to their removal.

The Defendant company, by their statement of defence, admitted the removal of the steps, but did not admit that they were a necessary convenience, or that their removal was wrongful.

The action now came on for trial.

Whitehorne (*Chitty*, Q.C., with him), for the Plaintiff company:—

The steps which were erected by the Plaintiff company were intended to provide a proper access to the station at *Maidstone*, and were works of maintenance, which the Defendant company have no right to remove. The power to work and maintain the railway and works, which was vested in the railway company under the Act of 1872, and under the former Acts, was not taken away by the working agreement under which the line has now been taken and worked by the Defendant company.

[JESSEL, M.R., referred to *Mulliner* v. *Midland Railway Company* (1).]

Under sect. 16 of the Act the Plaintiff company had power to sell and convey the railway, stations, and works, and all the powers of the company to the Defendant company. That sale has not taken place, and the powers of maintenance of the Plaintiff company as owners of the line still remain. The Defendant company will no doubt rely on the first clause of the terms of arrangement, which by sect. 15 are incorporated in the Act, and which provides that the railway when completed shall be "maintained and worked" by the Defendant company in perpetuity.

[JESSEL, M.R.:—Do not those words exclude the right of the Plaintiff company to maintain the railway and works?]

(1) *Ante* p. 611.

M. R.
1879
SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO. v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

The words of the Act shew that no such exclusive right is conferred. By sect. 4 the Plaintiff company were authorized "to make and maintain" the railway "with all proper stations, approaches, works, and conveniences connected therewith." By sect. 5 the period of three years was fixed for the completion of the railway, and it is provided that, "on the expiration of that period the powers by this Act granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as shall then be completed." The subject-matter of this action belongs to the completed part, as to which the powers granted by the Act, including the powers of maintaining, are by this section preserved. By sect. 16 it is implied that the powers of the Plaintiff company until a transfer or sale takes place remain. Sect. 18 provides that after any such transfer or sale as before authorized, the Defendant company may enjoy all the "powers" of the Plaintiff company with reference to the execution of works: we contend that, inasmuch as under sect. 15, which incorporates the terms of arrangement, the Defendant company have their own powers to "maintain and work," it follows that sect. 18 assumes the powers of the Plaintiff company to be subsisting until the transfer or sale takes place. Sect. 21 provides for the winding-up of the Plaintiff company if the transfer or sale be made; and sect. 24 gives validity to everything done before the time of the dissolution, except as is otherwise expressly provided; this would include the erection of the steps in question.

Further, we rely on the general law that when powers are given by affirmative words, they do not take away either common law powers or existing statutory powers: *Foster's Case* (1); *Phipson* v. *Harvett* (2). The construction contended for on behalf of the Plaintiff company is the only one which reconciles the various clauses of the Act, and when it is possible to reconcile discordant provisions in Acts of Parliament, that must be done (3). The Court cannot import into the Act an express prohibition against the exercise of the Plaintiff company's powers. The power for the Defendant company to maintain and work the line in per-

(1) 11 Rep. 63 a.
(2) 1 C. M. & R. 473; 7 Bac. Abr. 449, 450.
(3) 19 Vin. Abr. 519.

petuity is a mere license to do all things necessary for the working and maintaining of the line without interfering with the statutory powers of the Plaintiff company. The powers of the two companies are to a certain extent concurrent.

The action of the Plaintiff company was in no way inconsistent with the proper working of the line by the Defendant company, and no case of interference is raised by the pleadings. The Plaintiff company have done no wrong, and if it be said that the Defendant company, by the course they have taken, are carrying out the spirit of the Act, the observations of Lord Justice *Turner* in *Tinkler* v. *Wandsworth District Board of Works* (1) may be cited in reference to them: "It may be as well to caution these Defendants that, intrusted as they are by this Act with very extensive powers, it is their bounden duty to keep strictly within those powers, and not to be guided by any fancied view of the spirit of the Act which confers them."

Bagshawe, Q.C., and *Hornell*, for the Defendant company, were not called on.

JESSEL, M.R. :—

I have had an opportunity of forming the best opinion I can upon this matter, and therefore I can express my decision on the present occasion without troubling you, Mr. *Bagshawe*.

The question I have to decide is one of considerable importance, because I cannot doubt that agreements similar in form to this are very common indeed, and have been in very many cases confirmed by Act of Parliament. I regret that the framers of these agreements have not taken a little more trouble to express their meaning clearly, as they might thus have avoided such a case as this coming before a judicial tribunal.

The real question I have to decide is this, whether, under what I will term for this purpose the ordinary working agreement—for it differs but slightly from the agreements I have seen in great numbers between one railway and another—one company is entitled to the exclusive possession and to the exclusive right of

(1) 2 De G. & J. 274.

M. R.
1879
SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO. v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

maintenance of the railway and works of another company. It arises in this way: The Plaintiffs, whom I call for shortness the *Sevenoaks Company*, are owners of a small railway which was made with the assistance and support of the *London, Chatham, and Dover Company*. That company entered into a working agreement with the *Sevenoaks Company*, which was confirmed by the very Act of Parliament which authorized the making of the present *Sevenoaks Railway*. After the line was completed, pursuant to the terms of the working agreement, it was actually handed over to the *Dover Company*, who have ever since been in undisturbed possession of the railway and works.

The *Sevenoaks Company*, at the instance of some of the inhabitants of *Maidstone*, who represented to them that the access to the terminal station at *Maidstone* was inconvenient, improved, or wished to improve, that access, and for that purpose erected some stone steps, which as far as the present action is concerned were in the station yard, that is, within the railway proper which would be worked by the *Dover Company*. The *Dover Company* asserted that the *Sevenoaks Company* had no right whatever to enter upon the station yard for any purpose, or to alter the station steps, and thereupon removed the steps, and this action asks for a declaration that, as between the *Sevenoaks Company* and the *Dover Company*, the *Sevenoaks Company* still possess the right of entering into possession of the railway and also maintaining the railway, because it is agreed on both sides that these works, whatever they are, must be works of maintenance, the power of constructing the railway having expired by effluxion of time.

Now, I have no doubt that these are fairly works of maintenance. It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river which were faced in a particular way, could it be supposed that they were restricted under the words of maintenance to keeping up the banks in precisely the same way, when the mode which might have been very good when the banks were originally formed had been very much improved on by the subsequent advance of science? So where a railway company have to maintain a railway, I should not at all doubt that in

maintaining it they might use any reasonable improvement. If, for instance, the railway were originally fenced with wooden palings, and it were sought when they decayed to replace them by an iron fence, I should say that was fully within their powers. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick to make it more secure, I should say that was fair maintenance. And if a railway station were found inconvenient, and it was desirable when it required repairs to alter the arrangement of the rooms, or to alter the access or form of access, and so to ameliorate it at the same time that it was put in repair, I should say all that was within the powers of maintenance given by the Legislature; that is, you may maintain by keeping in the same state, or you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose. I have no doubt, therefore, that this work is authorized by the power to maintain.

I now come to the question as to the effect of the wording of the agreement. It has been urged on the part of the *Sevenoaks Company* that, inasmuch as the *Dover Company* have only the right to maintain and work the railway in perpetuity, that is in law a mere license empowering the licensees to do all things necessary for the maintaining and working of the line, but not interfering with the rights of the *Sevenoaks Company*, and it is said the powers under the Act of Parliament, to "make and maintain" the railway subject to the provisions of the Act, that is, subject to the agreement, are not interfered with by the power of maintenance given by the agreement to the *Dover Company*. I have come to an opposite conclusion, and am by no means going to determine what the effect of the agreement would be if it were not enacted by Act of Parliament, and if it were merely a contract between individuals. An Act of Parliament has power to create interests which were unknown to the common law, and which could not be created between individuals by contract.

Now we have not by law any such thing as a lease in perpetuity. We have a fee simple subject to a rent-charge, and we have a lease for years, but we have no such thing as a lease in perpetuity; and therefore, when we find a perpetuity of this kind, if it carries, as

M. R.
1879
SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO. v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

I think it does carry, the right to possession, that could not be properly described as a lease or as a fee simple, because it was not intended to vest in the *Dover Company* any of the soil, only the right of possession or occupation. Therefore I can well understand why the term "lease," or some similar term, was not used. But it is to my mind equivalent to a lease, so far as regards the possession of the surface and adjuncts necessary for the working of the line.

The way to look at it is this: the *Sevenoaks Company* are to construct and complete their line, and then to hand it over. The *Dover Company* are to keep it in perpetuity, to work it and maintain it. It cannot be contended for a moment that it was intended that the *Dover Company* were not entitled to possession of the line, or that they could have worked it and maintained it without such possession. It is obviously impossible, and no such argument was put forward. They must have possession. Having possession, is it to be exclusive possession? Having the obligation to maintain thrown on them, is it an exclusive obligation to maintain, and does it prevent the other company from maintaining? We must first consider what the object of the two companies was:— [His Lordship then referred to the recitals in the Act, and to the principal clauses in the terms of arrangement.]

Looking at that agreement, and seeing what the financial arrangement between the two companies was, it appears to me plain that it was never intended that there should be any power reserved to the *Sevenoaks Company* to maintain the line, that is, to expend money on it in keeping up the works, because if they did so they could not get it back again. All the expense of maintenance done by the *Dover Company* is to be repaid out of the gross earnings, and then the net surplus goes into the pockets of the *Sevenoaks Company;* but to imagine that they were entitled to maintain the line at the cost of the shareholders for the benefit of the *Dover Company* would be rather an extraordinary result, and therefore it appears to me, from the financial arrangements, quite plain that the whole maintenance was to be undertaken by the *Dover Company.*

But that is not my only reason for saying so. There is another reason. You cannot have a line of railway worked by two com-

panies at the same time. Here the words are, "shall be maintained and worked by the *Dover Company*." The working must be exclusive from the nature of the business to be done. And I think the same reason applies to the maintenance of the works. If it were otherwise, just consider the consequences that would result. A rail moves, and it is necessary to relay the plates. A gang of platelayers is sent down by the working company; according to the argument of the Plaintiff the *Sevenoaks Company* is also entitled to send down at the same time another gang of platelayers, and I suppose they are to settle the question as to which gang is to relay the plates by a free fight, without the possible interference of any Court. It is quite obvious that that cannot be; and the same thing applies to every case of repair and maintenance of the line. We know how they are conducted in practice. There is a superintending engineer, he is the officer of the *Dover Company*, who is to have the management of the line. He is the person to direct what kind of repairs are done. He prefers steel rails to iron rails. Whenever the old rails are worn out, he directs them to be relaid with steel. As I said before, that is maintenance with an improvement. The engineer of the *Sevenoaks* line prefers iron. He will send down his engineer and gang of workmen to repair the rails, and again there would be a fight between the men sent down to relay with steel and the others. It is absolutely impossible, to my mind, to imagine that the Legislature intended that two companies should be authorized at the same time to do that to the railway, any more than that two companies should be authorized at the same time to work the railway.

It seems to me that the working, and the maintenance, and the consequent possession must be exclusive, and therefore that the *Sevenoaks Company* after the completion of the line under this agreement had no right to enter at all, and had no right to interfere with the construction of any part of the works.

I may mention in corroboration of the view I have taken of the working agreement two cases which seem to me to have some bearing on the matter. The first is a case I well remember, a case of *Beman* v. *Rufford* (1). The agreement which was the

(1) 1 Sim. (N.S.) 550.

M. R.
1879
SEVENOAKS, MAIDSTONE, AND TUNBRIDGE RAILWAY CO. v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

subject of the litigation in that case was as follows: "The *Oxford, Worcester, and Wolverhampton Railway* is to be completed ready for efficient working in all respects from the *Bucks* line at *Oxford*. The whole concern without incumbrance, when completed, to be worked by the *London and North Western* and *Midland Companies*, who shall have perfect control, and exercise all the rights of the *Oxford, Worcester, and Wolverhampton Company*, and who shall find stock and work the concern for twenty-one years." No doubt the words were "to have perfect control and exercise all the rights," but there were no words to say it was exclusive. Upon that Lord *Cranworth* says (1): "In my opinion, this is neither more nor less than a contract on the part of the *Oxford, Worcester, and Wolverhampton Company* that, when their line is completed, they will hand it over to be worked by the *London and North Western Company* and the *Midland Company*. I put the question, several times, to the various gentlemen who appeared in the different interests, and I do not think that any of them construed it quite in the same way; but in my opinion it is just the same thing, practically, as if they had leased the line to the two other companies." He said "leased" there because it was for a term of twenty-one years, and I said before an agreement to work is practically the same thing as a lease.

There is another well-known case, which was very often cited in my early days at the bar, of *Winch* v. *Birkenhead, Lancashire, and Cheshire Junction Railway Company* (2). The agreement was: "The *London and North Western Railway Company* for a term of ninety-nine years to work the lines of the *Birkenhead Railway Company*, using the property and plant of the latter company." They were to run as many trains as the traffic should require, and to deduct the working expenses. The property and plant of the *Birkenhead Railway Company* were to be valued and restored at the termination of the agreement of the same working value. In that case there was one favourable circumstance which does not exist here. The plant taken was the plant of the *Birkenhead Company*, so that the working company did not find the plant, which they do in this case, but the agreement was "to work the lines," using the plant.

(1) 1 Sim. (N.S.) 569. (2) 5 De G. & Sm. 562.

In that case, *Knight Bruce*, V.C., considers (1) what is the effect of such an agreement. He says: "The agreement expresses that the *London and North Western Railway Company* are to run the trains, with an express provision as to working expenses; pointing out, therefore, that what is meant by working is the maintenance of the way, and making good the depreciation of the way, of the works, and of the plant." The word "maintenance" was not expressed there but it was inferred. The working includes maintenance of way. He adds: "The company who work the other railway are to have the use of the property and plant of that railway; and that must mean the exclusive use of it as between themselves and the *Birkenhead Railway Company*, because it is clear that if the *London and North Western Railway Company* are to work it under this agreement, the *Birkenhead Railway Company* cannot work it; they must part with the use of their property and plant."

It appears to me, on both those authorities, that agreements for working mean the exclusive use, and as the agreements, the subjects of those decisions, are not only similar in words, but similar in purpose, I think they are guides to me in shewing that in construing this agreement I ought to arrive at the same conclusion, and therefore I dismiss the action with costs.

Solicitors for Plaintiff Company: *Newwman, Hilliard, & Stretton.*
Solicitor for Defendant Company: *J. White.*

(1) 5 De G. & Sm. 579.

M. R.
1879
Jan. 8.

WALROND *v.* ROSSLYN.

[1862 W. 37.]

WALROND *v.* FULFORD.

[1871 W. 36.]

Settlement of Real Estate—Legal Jointure—Money liable to be invested in Land—Reconversion—Equity of Jointress.

Where money was liable to be invested in land to be settled to uses in strict settlement, and all the uses were exhausted except a legal jointure:—

Held, that the jointress had an equity to compel the investment of the money in land, and that, consequently, the same must be treated as real estate as between the real and personal representatives of the person who, subject to the jointure, was entitled thereto.

Semble, it would be otherwise as to portioners.

By a settlement dated the 10th of November, 1829, and made on the marriage of *Bethell Walrond* and Lady *Janet Walrond*, *Bethell Walrond* assured certain hereditaments to the use of himself for life, with remainder to the use that Lady *Janet Walrond* should after his decease receive during her life for her jointure, in bar of dower, a yearly rent-charge of £1600, to be charged on and payable out of the said hereditaments, and, subject thereto, to the use of trustees for a term of 500 years upon trust for better securing the said rent-charge, with powers of distress and entry, and upon the other trusts therein mentioned, being usual trusts for raising portions for younger children with remainder to the use of the first and other sons of the said *Bethell Walrond* in tail, with remainders over.

By the same settlement power was given to the trustees during the joint lives of *Bethell Walrond* and Lady *Janet Walrond*, and of *Bethell Walrond* if he survived, by their or his request in writing, to dispose of, by way of absolute sale or in exchange for other hereditaments, all or any part of the hereditaments thereby conveyed for such price or such equivalent in lands as to the trustees should seem reasonable, and to revoke the uses of the hereditaments so sold and declare new uses; and it was thereby

declared that when all or any part of the said hereditaments should be sold for valuable consideration, the trustees should invest the money to arise by such sale in the purchase of other hereditaments to be held with the hereditaments thereby settled —every such purchase, during the lives of *Bethell Walrond* and Lady *Janet Walrond*, to be made with their, his, or her consent in writing, and the hereditaments so purchased to be settled to and for the same uses, trusts, and purposes as those declared by and contained in the said settlement.

There were five children of the marriage, of whom three died unmarried and under twenty-one in the lifetime of their parents, and two were now living, namely, *Harriet Walrond* and *Henry Walrond*.

In 1830 certain lands, part of the settled property called "*Mannings*," were sold by the trustees with the concurrence of *Bethell Walrond* for £1290, which, by permission of the trustees, was received by *Bethell Walrond*, and was applied by him to his own use.

In 1862 *Henry Walrond* instituted a suit against the surviving trustee of the settlement and *Bethell Walrond* as Defendants, praying, among other things, that the money received by the sale of the estate called "*Mannings*" might be replaced by the Defendants and invested according to the trusts of the settlement. By the decree in the suit *Bethell Walrond* was declared liable to make good the sum of £1290, being the amount received by the sale of the estate, and by a subsequent order in 1866 the same was ordered to be paid into Court, and it was so paid accordingly.

By an indenture of the 27th of December, 1867, which was inrolled as a disentailing assurance, in consideration of £30,000 paid to *Henry Walrond*, the said *Henry Walrond* granted to *Bethell Walrond* in fee all his estate and interest under the settlement in the property therein comprised, freed and discharged from his estate tail and all remainders.

By a mortgage of the 28th of January, 1868, *Bethell Walrond* mortgaged the settled property and the fund in Court (the proceeds of the sale of "*Mannings*") as a security for £15,000.

In 1876 *Bethell Walrond* died. After his death the portion of *Harriet Walrond* under the settlement was raised. By a judg-

M. R.
1879
WALROND
v.
ROSSLYN.
WALROND
v.
FULFORD.

ment of the Probate Division the later wills and codicils of *Bethell Walrond* were set aside, and he was treated for the purpose of this petition as if he had died intestate, and administration *pendente lite* was granted to his estate by order of the Court.

Henry Walrond was the heir-at-law of *Bethell Walrond*, and his widow, Lady *Janet Walrond*, his son *Henry Walrond*, and his daughter *Harriet Walrond* were the persons entitled under the *Statute of Distributions* to his personal estate.

The said sum of £1290 was now represented by the sum of £1476 8*s.* 3*d.* consols. The present petition was presented by *Henry Walrond*, and prayed a declaration that the fund in Court and the dividends accrued due thereon since the death of *Bethell Walrond*, ought, as between the real and personal representatives of *Bethell Walrond*, to be treated as representing real estate, and that the same might be paid to him as heir-at-law.

Lady *Janet Walrond* and *Harriet Walrond*, as two of the persons entitled to the personal estate, claimed that the fund in Court might be treated as personal estate.

In the view taken by the Court the main question was whether the uses of the settlement could be treated as having become exhausted, or whether, there being a subsisting legal jointure, the jointress had not such an equity to have the fund in question re-invested in land as would be sufficient to make the fund retain its character of real estate. Under the particular circumstances of the case, the jointress being one of the persons entitled to the personal estate, her actual interest was to treat the fund as personalty, but this was not considered material.

Marten, Q.C., and *Philpotts*, for the Petitioner:—

The settlement made in 1829 was an ordinary settlement of real estate, and all the uses of the settlement were real uses. It follows that the fund in Court, which represents the proceeds of the sale of part of the real estate, must, as between the heir-at-law and the next of kin of *Bethell Walrond*, be treated as real estate. It may be said on behalf of the next of kin of *Bethell Walrond*, that he elected to treat it as personal estate and to convert it, but there can be no conversion except by the actual owner of an estate: *Sisson* v. *Giles* (1). Here Lady *Janet Walrond*, who was

(1) 3 D. J. & S. 614.

entitled to a jointure rent-charge on the settled property, being a married woman, could only consent to the property being converted by a deed acknowledged; therefore it is immaterial to consider whether or not *Bethell Walrond* elected to treat it as personalty, though we do not admit that he did so elect.

Chitty, Q.C., and *Sladen*, for the mortgagees, submitted to such order as the Court might make, provided that their rights were not prejudiced.

Whately, for the personal representatives of *Bethell Walrond*, and for his widow and daughter:—

Bethell Walrond, by his acts, must be taken to have elected to treat the part of the settled property which was sold as personalty, and the fact of Lady *Janet* being a jointress did not debar him from so electing, the jointure being only a charge on the estate. In fact, the power for reinvestment as regards that part of the property became at an end in the lifetime of *Bethell Walrond*, the portions and the subsisting jointure being substantially only charges on the land and fund, and the uses of the settlement became exhausted by the merger of the life estate in the reversion in fee: *Wolley* v. *Jenkins* (1).

[JESSEL, M.R.:—Did not the jointress, Lady *Janet Walrond*, by the settlement, contract to have the jointure secured on land, and could she not now bring an action to have it so secured and to have the money reinvested? That is the whole question.]

Philpotts mentioned the case of *Harcourt* v. *Seymour* (2).

Romer, for the trustees.

JESSEL, M.R.:—

It is singular that this point should not have been decided. When you come to look at the trusts of the settlement it is obviously an ordinary settlement of freehold estate with a jointure in the form of a legal rent-charge and portions.

My present impression is that the portioners could not require

(1) 23 Beav. 53; 3 Jur. (N.S.) 321.
(2) 2 Sim. (N.S.) 12.

M. R.
1879
WALROND
v.
ROSSLYN.
WALROND
v.
FULFORD.

the proceeds of the sale to be reinvested in land. But it appears to me that the jointress is in a totally different position. The jointress has a bargain to have land—to have a legal rent-charge on freehold estate; and the contract is that the trustees may, with certain consents, sell the estate and then buy other freehold estate with the consent of her and her husband, or the survivor, or after the death of the survivor, without any consent.

In fact, therefore, she could consent to this extent: she could consent to the sale of the land, but she could say to the trustees, "I want the money invested in the purchase of another estate on which I shall have a charge." That was the bargain and agreement.

The question is, whether that is an agreement which she could call on the Court to enforce? It is said on the part of the personal representatives of the tenant for life (he having bought the estate of the remaindermen), "You are not entitled to enforce the agreement, because you are only entitled to a money payment of an annuity, and if it is secured it is immaterial out of what fund it is secured;" in other words, no person entitled to a rent-charge on lands to be purchased is entitled to enforce the purchase. I think that is not so; I think the true principle is that the jointress has a right to say, "My bargain was to have a legal rent-charge. I don't choose to take the security of consols, I prefer land." I think that case is within the doctrine of specific performance. The security in money would involve a difference in the nature of the bargain and in the rights over the property, and such a difference that I think the case is within the doctrine of of specific performance.

There will be a declaration that the fund in Court is to be treated as real estate as between the real and personal representatives of *Bethell Walrond.*

Solicitors: *R. H. Willcocks,* agent for *Whidborne & Tozer, Teignmouth; G. F. & M. Rooper; Darley & Cumberland.*

In re RIDLEY.
BUCKTON *v.* HAY.

[1864 R. 108.]

M. R.
1879
Feb. 3.

Married Woman—Restraint on Alienation beyond Legal Limits—Remoteness—Rule against Perpetuities.

Bequest of a fund in trust for *A.* for life, and after her death in trust for her children living at her death, and the issue then living of any child then dead, in equal shares, the issue to take their parent's share; any legatees, being females, to take for their sole and separate use without power of anticipation. *A.* survived the testator and died leaving two married daughters who were born in the testator's lifetime:—

Held, reluctantly following previous decisions, that the restraint on anticipation was void as infringing the rule against perpetuities, and that the daughters were accordingly entitled to have the fund paid to them in moieties, on their separate receipts, discharged from such restraint.

Quære, whether, inasmuch as the object of restraining a married woman from anticipation is to give her the beneficial enjoyment of her property, such a restraint ought not to be an exception to the general rule against perpetuities.

The doctrine of restraint on alienation considered.

FRANCIS RIDLEY, by his will, dated the 8th of January, 1863, directed his trustees to invest a fund in the securities thereby authorized, and to stand possessed of a moiety of such securities upon trust to pay the interest thereof to his niece *Alice Ridley* for her life, and after her death, in trust for all and every the children or child of the said *Alice Ridley* as should be living at the time of her death, and the issue then living of such of them as should have died in her lifetime, in equal shares, such issue to take their respective parents' shares; and in case there should be no child of the said *Alice Ridley*, or no child or issue who should attain a vested interest in the said moiety, then in trust for such person or persons as the said *Alice Ridley* should, whether covert or sole, by will appoint; and in default of such appointment in trust for her next of kin who should be living at the time of her death and such default or failure of her issue as aforesaid, according to the Statutes of Distribution. And the testator directed that his trustees should invest the sum of £4000 in the securities authorized by his will, and stand possessed thereof in trust to pay

M. R. 1879 *In re* RIDLEY. BUCKTON *v.* HAY.

the interest thereof to his niece *Mary Cooper* during her life, and after her death upon the same trusts in favour of the children or issue or parties claiming under any will of the said *Mary Cooper* in all respects as were thereinbefore declared concerning the securities bequeathed in trust for the children of the said *Alice Ridley*. And the testator, after making other bequests, proceeded as follows: "Provided also, and my will further is that the several legacies and bequests whether of income or principal hereby given to or for the benefit of any legatees, being females, shall be for the respective sole and separate use independent of and free from the debts, control, or engagements of any husband or husbands whomsoever, and that the receipts of such legatees respectively, whether covert or sole, shall be good and sufficient discharges to my trustees, but not so as to enable such legatees respectively to anticipate, charge, sell, and dispose, or otherwise encumber such legacies and bequests, or the annual income thereof, or any part thereof respectively."

The testator died on the 1st of May, 1863.

In 1864 a decree was made for the administration of the testator's estate, the Plaintiffs being some of his next of kin, and the Defendants the trustees of the will, who transferred into Court a sum of £4200 5*s.* 2*d.* consols representing the legacy bequeathed in favour of *Mary Cooper*, and the income of the fund was paid to her during her life.

Mary Cooper died in 1878, having had eight children, six of whom died in her lifetime without having been married. The remaining two, daughters, survived their mother. They were born in the testator's lifetime and had attained twenty-one and married. Both their husbands were now living.

This was a petition presented by the two married daughters by their next friend, praying that the fund in Court might be paid out to them in moieties on their separate receipts.

The husbands were made Respondents to the petition.

The question was whether the restraint on anticipation was void as transgressing the law against perpetuities.

Chitty, Q.C., and *Oswald*, for the Petitioners:—

We submit that the restraint on anticipation is void as infring-

ing the rule against perpetuities, though the remainder of the gift is good. The Petitioners are, therefore, entitled to the fund absolutely, discharged from the restraint.

[JESSEL, M.R.:—Why should a restraint on anticipation be void? It is only a mode of enjoyment.]

It has been held that a restraint on anticipation in a gift or appointment which may include unborn children is void, as being too remote: *Armitage* v. *Coates* (1); *In re Cunynghame's Settlement* (2); *In re Michael's Trusts* (3).

[JESSEL, M.R.:—The question is, whether a restraint on anticipation is not an exception to the general rule against perpetuities and remoteness, following out the legal principle that property shall not be inalienable.]

No exception has yet been allowed against the rule of perpetuities.

[JESSEL, M.R.:—The rule against perpetuities is that you shall not make property absolutely inalienable beyond a certain period. It is only a rule in favour of alienation.]

In *Thornton* v. *Bright* (4), Lord Chancellor *Cottenham* held that an appointment by a father under his marriage settlement to his married daughter for her separate use, without power of anticipation, was a good appointment to the extent of the separate use, and that decision was followed by Lord *Hatherley*, when Vice-Chancellor, in *Fry* v. *Capper* (5), where he held that the restraint on anticipation was void and might be rejected, though the separate use might be sustained.

[JESSEL, M.R.:—The Judges do not seem to have considered the real point. If a restraint on anticipation is an infringement of the rule against perpetuities, a father would be prevented from appointing to his children, under a settlement, in a way most beneficial to his daughters.]

If the rule is broken into at all, it is difficult to see where it is to stop.

(1) 35 Beav. 1.
(2) Law Rep. 11 Eq. 324.
(3) 46 L. J. (Ch.) 651.
(4) 2 My. & Cr. 230.
(5) Kay, 163.

M. R.
1879
In re RIDLEY.
BUCKTON *v.* HAY.

[JESSEL, M.R.:—The question is whether this is not to be the exception to the rule. Why should not a father appoint to his daughters in a way most beneficial to them, that is, appoint in such a way that the daughters and not their husbands, who are not the objects of the settlor's bounty at all, shall have the benefit? The restraint on anticipation was thought so beneficial that it broke into the general law against inalienability; that is to say, all property was to be alienable except a married woman's.]

The authorities are certainly against a restraint on anticipation being imposed upon a class of persons some of whom may possibly be unborn.

Whitehorne, for the trustees, referred to *In re Ellis' Trusts* (1) and *Baggett* v. *Meux* (2).

Owen, for the husbands.

JESSEL, M.R.:—

The law upon the present point appears to me to be in an unsatisfactory state, and I hope it may eventually come to be considered by the Court of Appeal.

This gift is, in effect, to a person for life, and then to her children living at her death; daughters who are married women to take with a restraint on anticipation. The question is whether the gift is void, or whether the restraint alone is void and the gift is good.

Now, it is necessary to consider what the meaning of a restraint on anticipation is, for with the exception of a single observation in one of the authorities, to which I will refer presently, the point does not seem to have been discussed at all.

In the first place, the law of this country says that all property shall be alienable; but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman. That was purely an equity doctrine, the invention of the Chancellors, and is, as I have said, an exception to the general law which says that property shall

(1) Law Rep. 17 Eq. 409. (2) 1 Coll. 138; 1 Ph. 627.

not be inalienable. That exception was justified on the ground that it was the only way, or at least the best way, of giving property to a married woman. It was considered that to give it her without such a restraint would be, practically, to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation of her property.

That ground I must assume to be correct. The result, therefore, was that the exception to the general law was in favour of married women, to enable them to enjoy their property.

Then there was another rule, also invented by the Chancellors, in analogy to the common law. That was an invention of a different kind from the other, and was this time in favour of alienation and not against it. The law does not recognise dispositions which would practically make property inalienable for ever. Contingent remainders were introduced, which had the effect of rendering property inalienable. The doctrine of contingent remainders was discussed by the Chancellors, who held that a remainder depending upon what was called a possibility on a possibility was contrary to the common law. That was a wholesome rule, only it was considered that it did not go far enough. The result was that the Chancellors established this rule in favour of alienation, that property could not be tied up longer than for a life in being and twenty-one years after. That is called the rule against perpetuities. This rule, therefore, was established directly in favour of alienation: it merely carried out the principle of law that property is alienable. Similarly in the case of executory interests, the law put a limit or fetter upon the testamentary power. The theory of both rules is, however, the same, namely, that property is alienable, though it may be made inalienable to a certain extent and in a peculiar way.

The question is, whether the restraint on alienation should not be allowed within certain limits under the one rule as well as under the other. The first exception is a clear and manifest exception to the general law, which says that property shall be alienable; the question is, whether there should not be a similar exception to that branch of the general law which says that property shall not be inalienable beyond a life in being and twenty-one years

M. R. 1879 *In re* RIDLEY. BUCKTON v. HAY.

after. But this question does not appear to me to have been well weighed or considered.

Take the case of an ordinary marriage settlement, where property is settled for the benefit of the husband and wife and then on their children as they shall appoint. They have sons and daughters. If the exception applies to the rule against perpetuities, they may appoint to such daughters with a restraint on anticipation. If, on the other hand, the rule against perpetuities is to prevail, they cannot do so; that is, they cannot appoint the property to the daughters in such a way as to give them the actual benefit of it, though in the case of the sons they can do so. This is one instance of the inconvenience which follows from holding that a daughter in such a case cannot be restrained from anticipation during coverture.

Now it is remarkable that the decision of Lord *Cottenham* in *Thornton* v. *Bright* (1) seems to have been to the other effect. The point, I agree, was not argued, but we cannot imagine that the very eminent counsel who argued the case, and the very eminent Judge who decided it, overlooked the point. And in *Fry* v. *Capper* (2), where there was an appointment under a marriage settlement to a daughter for her separate use, without power of anticipation, Lord *Hatherley*, when Vice-Chancellor, in referring to *Thornton* v. *Bright*, said, "The appointment was decided by Lord Chancellor *Cottenham* to be a valid exercise of the power. Therefore, independently of principle, it would be difficult for me, after that decision, to hold this appointment to be bad." Lord *Hatherley* accordingly held that the appointment was not void as fettering the property beyond the legal limits, but that the restraint on anticipation might alone be rejected. Since those cases there have been further decisions with which I am not satisfied, but which, nevertheless, sitting here as a Judge of first instance, I am not at liberty to disregard. The point came before Vice-Chancellor *James* in *In re Teague's Settlement* (3). There a widow, who had under her marriage settlement a power of appointment amongst the children of the marriage, executed the power by giving a share of the settlement fund to a married daughter

(1) 2 My. & Cr. 230. (2) Kay, 163.
(3) Law Rep. 10 Eq. 564.

for her separate use, without power of anticipation, and the Vice-Chancellor held that the restraint on anticipation only was void, but that the remainder of the appointment was good. I must say the Vice-Chancellor's judgment is very unsatisfactory to me, because he gives no reasons, and he does not consider what the effect of a restraint on anticipation is.

It was argued by Mr. *Hardy* that the restraint on anticipation was good, and he says (1), "It cannot be said that the rule would have been infringed if Mrs. *Teague* had put this restraint upon her daughter for twenty-one years and no more; then what reasonable ground is there for not extending the protection to the daughter throughout her married life?" He must have meant by that what I have already expressed, that the object of the restraint was to give the daughter the actual benefit of the appointment. Then the Vice-Chancellor, after referring to *Fry* v. *Capper* (2) as a decision in point, says, "I think it is impossible to hold that the rule against perpetuities can be abrogated in the way which has been suggested."

That is practically the whole of the Vice-Chancellor's judgment. The answer to that is, You do not want to abrogate the rule; the question is, whether the restraint on anticipation is not an exception not merely to the particular rule, but an exception along the whole line, so to speak. The Vice-Chancellor really gave the go-by to the point.

Then the point came before Vice-Chancellor *Malins* in *In re Cunynghame's Settlement* (3)—the same point exactly. There, under a marriage settlement, the husband appointed the fund to the separate use of a married daughter, with a restraint on anticipation, and it was held that the appointment to the separate use was valid, but that the restraint on anticipation was void as being too remote.

Now all the Vice-Chancellor says is this: "I am of opinion that, upon principle, this is an invalid exercise of the power so far as it restrains alienation." Then, after referring to the authorities I have already mentioned, he says, "I should have arrived at the same decision in the absence of authority, but the cases I have

(1) Law Rep. 10 Eq. 568. (2) Kay, 163.
(3) Law Rep. 11 Eq. 324.

M. R. 1879 *In re* RIDLEY. BUCKTON *v.* HAY.

referred to confirm me in the opinion that the restraint on alienation is not within the power." The whole argument of his judgment was, that it was a restraint which might extend beyond the limit, and was therefore void, but he did not consider whether, though extending beyond the limit, it was not an exception to the general rule. Therefore he really did not consider the point at all.

Then the last case is that of *In re Michael's Trusts* (1), before Vice-Chancellor *Hall*, who referred to a *dictum* of Lord *Romilly's* in *Armitage* v. *Coates* (2), and his only judgment, as reported, was that he thought *Armitage* v. *Coates* applied to the case before him, and made the order as prayed.

So that not one of the Judges appear to me to have considered the real point, namely, whether a restriction on alienation, such as there is in the present case, is valid. I cannot, however, do otherwise than follow their decisions, though but for them my judgment would have been to the opposite effect, but I think the point is open for the Court of Appeal.

The order will, therefore, be as prayed.

Solicitors: *Belfrage & Middleton*; *Sheffield & Sons.*

M. R. 1879 *March* 22.

STANDERING *v.* HALL.

[1877 S. 246.]

Practice—Partition Action—Sale Moneys—Real Estate—Married Woman—Payment to Husband—Election to take as Personal Estate—Examination in Court.

16 Ch D 364

The share of a married woman in the proceeds of sale of real estate devised to her in fee, and which has been sold under an order in a partition action, may be paid to her husband on her electing by examination in Court to take the money as personal estate.

Observations on *In re Hayes* (3).

THIS was an action for sale or partition of the real estate comprised in the will of a testator, *Samuel Staniland*, who died in

(1) 46 L. J. (Ch.) 651. (2) 35 Beav. 1.
(3) 9 W. R. 769.

M. R.
1879
STANDERING
v.
HALL.

1852; the property was devised to the use of trustees in trust for the testator's grandchildren as tenants in common in fee, three of whom were married women, their husbands being still living.

Under an order in the action the real estate had been sold, and the proceeds paid into Court.

The action now came on as a short cause, upon further consideration, and by the minutes of order it was proposed to divide the fund in Court among the parties; the shares of the married women to be paid to the husbands in right of their wives.

Wiglesworth, for the Plaintiffs:—

As regards the share of each of the married women, this being an action under the Partition Acts, the money is real estate: *Mildmay* v. *Quicke* (1); and the question is whether money belonging to a married woman, which is liable to be reinvested in land, can be disposed of by her otherwise than by a deed acknowledged under sect. 77 of the *Fines and Recoveries Act*. There are several reported cases in which such a deed was dispensed with, and money in Court belonging to the wife which was liable to be reinvested in land was paid to the husband, the wife being examined in Court for the purpose of giving her consent to the payment; but they all seem to have proceeded by analogy to the cases of tenants in tail, who, since the *Fines and Recoveries Act*, have been allowed to take money out of Court—the produce of the sale of the entailed estate—without the execution of a disentailing deed under the Act. It is, however, now settled by *In re Reynolds* (2) that in all such cases a disentailing deed must be executed; and it is therefore doubtful whether the provisions of the Act must not also be followed in the case of a married woman disposing of money representing land to which she is entitled in fee.

W. B. Heath, for one of the married women and her husband, suggested that the money might be paid to the husband on the wife being examined in Court and electing to take the money as personal estate; *Seton* on Decrees (3): though there did not appear

(1) 6 Ch. D. 553. (2) 3 Ch. D. 61.
(3) 4th Ed. p. 665.

M. R. 1879

STANDERING v. HALL.

to be any express authority as to what should be the practice under the Partition Acts.

Wiglesworth :—

In *In re Hayes* (1) Vice-Chancellor *Kindersley* said "he would make the order for payment out on her examination only. This was, in fact, substituting examination for an acknowledgment by deed."

[JESSEL, M.R. :—That cannot possibly be the principle. There must have been some mode before the *Fines and Recoveries Act* of enabling married women to make their election in such cases.]

Bond Coxe, *B. Eyre*, and *Byrne*, for other parties.

JESSEL, M.R. :—

It appears from the authorities that before the *Fines and Recoveries Act* married women could make their election by examination in Court.

In *Cunningham* v. *Moody* (2) a sum of £500 was by marriage articles agreed to be laid out in the purchase of land to uses of husband and wife for life, then to the children as they should appoint; in default of appointment, equally; if but one, to that one in tail, with a reversion to the husband in fee. There was issue by this marriage one daughter, and the trustee paid the £500 to her and her husband, she not being *sui juris* or separately examined. The question was whether the £500 was still to be considered as land, or whether by the payment it was to be considered as money. Lord *Hardwicke* said (3): "Where the remainder can be barred by fine, the Court will decree it in money: but here was tenant in tail, reversion in fee in one moiety to herself; and therefore certainly if she was *sui juris*, and brought a bill for the money, a moiety would be decreed to be paid to her, the other moiety to be put out at interest, to go as the profits of the land would: but here she was a *feme covert*; and then the rule is, that although she had the reversion in fee of the whole, it should be laid out, unless some further act was done, by her coming into the Court to be solely and separately examined, analogous to the form

(1) 9 W. R. 769. (2) 1 Ves. Sen. 174. (3) 1 Ves. Sen. 176.

of a fine at law; and then if she declared her consent to have it in money, without the influence of the husband; the Court would decree it so."

The point came before Lord Commissioner *Eyre* in *Binford* v. *Bawden* (1). There "money was devised to be laid out in land for a *feme covert* in tail with reversion to her in fee. For the Plaintiff it was prayed, as according to the usual course of the Court in these cases, that she should be examined by commission, apart from her husband, as to her inclination with regard to the disposition of the money; and that, if she chose to take it as money, it should be paid to her." Lord Commissioner *Eyre* said (2), "It is clear the Court would do it in case of a person *sui juris*. It is equally clear they would refuse it in case of an infant. I want to know whether there is any case shewing what the Court does in the case of a *feme covert*." Thereupon counsel referred to *Cunningham* v. *Moody* (3), and then Lord Commissioner *Eyre* made a declaration that she was entitled to the money, and directed a commission "to examine her separate and apart from her husband touching the disposition of the said sum, whether she will have it laid out in land, or receive it in money." That then is a distinct decision—not a mere *dictum*—that in the case of a married woman the Court would examine her as to her election. From a subsequent report of the case (4) it appears that the married woman was examined and elected to have the money paid to her husband.

The object, therefore, of requiring the married woman to be examined was to enable her to elect whether she would take the money as land or as money. In the case before Vice-Chancellor *Kindersley* the true reason for examining the wife had evidently been overlooked.

I will make an order according to the minutes, subject to the married women electing to take the money as personal estate on their examination in Court.

Solicitors: *Ridsdale, Craddock, & Ridsdale,* agents for *Weddall & Parker, Selby; Learoyd, Learoyd, & Peace; Phelps, Sidgwick & Biddle; Layton & Jaques.*

(1) 1 Ves. 512.
(2) Ibid.
(3) 1 Ves. Sen. 174.
(4) 2 Ves. 38.

V.-C. B.
1879
May 8.

SINGER MANUFACTURING COMPANY *v.* LOOG.

[1878 S. 148.]

Practice—Trial by Jury—Trade-Name—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26.

An action to restrain the use of a trade-name involved, besides the usual trade-mark issues, the special question, whether the name had not become the name of a specific machine. Upon motion by Defendant for transfer of the action to a Common Law Division and entry for trial, and for the settlement of issues to be tried by Judge and jury:—

Held, under Rules of Court, 1875, Order XXXVI., rules 3, 26, that the action was unfit for a jury, and motion refused.

MOTION on behalf of the Defendant, that the issues of fact in the action might be tried before a Judge and jury, and that for that purpose the action might be transferred to one of the Common Law Divisions, and that the Plaintiffs might be ordered to concur in such transfer, and to enter the cause for trial in one of such Divisions; also that the issues of fact to be tried by the Judge and jury might, if the Court should think fit, be settled by the Court, in case the parties differed.

The bill was filed by the *Singer Manufacturing Company* against *Hermann Loog*, praying for an injunction to restrain the Defendant and his agents from selling, or offering for sale, or advertising, or invoicing as "*Singer* machines" any sewing-machine not of the Plaintiffs' manufacture, and from selling and offering for sale any sewing-machine not of the Plaintiffs' manufacture having branded, impressed, stamped, or painted thereon the words "*Singer* machine," or the word "*Singer*," and from otherwise using in any manner whatever the name "*Singer*" as a designation of a sewing-machine not of the Plaintiffs' manufacture, and from representing in any way that machines not of the Plaintiffs' manufacture were "*Singer* machines," and from representing machines sold by the Defendant and not of the Plaintiffs' manufacture to be of the Plaintiffs' manufacture.

The defence was that the term "*Singer*" was no longer confined to machines manufactured by the Plaintiffs, but had come to

mean machines of a particular system of construction, by whomsoever made.

In an affidavit made by the Defendant's solicitors, it was suggested that the issues of fact to be tried were:—"First, whether the word '*Singer*,' as applied to or used in connection with a sewing-machine, is a trade-name or designation of the Plaintiffs' machines to which the Plaintiffs are exclusively entitled, and whether the word '*Singer*' is in fact so used by the Plaintiffs, or whether the word '*Singer*,' when applied to a sewing-machine, has acquired in the trade the meaning of and is used as descriptive of a machine of a particular class or mode of construction or character; secondly, whether the Defendant has or has not used the words '*Singer*,' or '*Singer* system,' for the purpose of appropriating to machines sold by him the reputation attached to machines of the Plaintiffs' manufacture, or as descriptive only of the class or character of sewing-machines sold by him; and thirdly, whether the Defendant by the use of the names '*Singer*,' or '*Singer* system,' induces or has induced any person or persons who purchase or have purchased sewing-machines to purchase them as machines manufactured or made by the Plaintiffs."

Sir *H. Jackson*, Q.C., and *Everitt*, for the motion:—

The motion is made under rule 3 of Order XXXVI., and follows the decision in this branch of the Court of *West* v. *White* (1), from which case the present is not distinguishable. No doubt, the Court may, under rule 26, "if it shall appear desirable," direct a trial without a jury of any question or issue of fact, or of mixed law and fact, arising in the action; and hence, the jurisdiction being beyond question, it comes to this—whether, in the discretion of the Court, it is desirable or not that this particular case should be tried without a jury.

One of the issues is, whether the Plaintiffs have a title to the trade-mark. Another is, whether the Defendant has shewn "an intention to appropriate" the reputation acquired by the Plaintiffs' machines—that is to say, has shewn an *animus furandi*. Is not a question of motive one which the Court will consider desirable to be tried by a jury? In *Spratt's Patent* v. *Ward* (2) an applica-

(1) 4 Ch. D. 631. (2) *Ante*, p. 240.

V.-C. B. 1879

SINGER MANUFACTURING COMPANY v. LOOG.

tion similar to this on behalf of the Defendant was refused, but the case was ready for trial, and the only issue was whether a lad who was sent on an errand used a particular expression or not.

In this instance the Defendant is defending his property, his *status*, and to some extent his character, and under such circumstances is entitled to a jury as of right.

West v. *White* (1) and a former decision of Vice-Chancellor *Hall* in *Clarke* v. *Cookson* (2) were followed by the Master of the Rolls in *Bordier* v. *Burrell* (3).

Aston, Q.C., *Hemming*, Q.C., and *Rigby*, for the Plaintiffs, opposed the motion:—

It was decided by the House of Lords in "*Singer*" *Machine Manufacturers* v. *Wilson* (4) that fraud does not enter into this dispute at all. It is a mere question of trade-mark, so that the argument founded on motive falls to the ground.

The question is not about the Defendant's property, but whether the Plaintiffs have a property in this name of which the Defendant is seeking to deprive them. That is a question of law. The only fact requiring to be established is that the Plaintiffs have been accustomed for many years to sell their manufactures under a particular name. That will have to be proved by persons familiar with the trade, and can be proved very shortly. So that, this being moreover essentially a Chancery action, the case falls within *Spratt's Patent* v. *Ward* (5).

[BACON, V.C.:—In *Spratt's Patent* v. *Ward* the Defendant said that he had a right to have a particular question of fact tried before a jury, and upon that applied under the 3rd rule of the Order to have the whole action sent to be tried by a jury. The object there was to prevent the hearing of the cause.]

The question is solely one of discretion, and *West* v. *White* does not stand in our way. In *West* v. *White* and *Bordier* v. *Burrell* there were minute questions of fact to be decided, such as whether smoke came from a particular chimney, or whether one window was larger or smaller than another. Here there is no question of

(1) 4 Ch. D. 631.
(2) 2 Ch. D. 746.
(3) 5 Ch. D. 512.
(4) 3 App. Cas. 376.
(5) *Ante*, p. 240.

mala fides, and the only issue is one of proprietary right. The admitted object of the Defendant is here, as it was in *Spratt's Patent* v. *Ward* (1), to prevent the hearing of the action.

In almost all trade-mark cases the questions are two—have the Plaintiffs a right to the mark, and has the Defendant infringed? The former, which is almost invariably the all-important question, is one of mixed law and fact. The second in this case does not arise, for the Defendant here admits what he has done. The sole question is an inference of law from facts, involving very complex considerations, and essentially fit for a Judge, and not for a jury.

The Defendant in his statement of defence refers to no less than ten letters patent and specifications, all or some of which he alleges to be material. He also describes minutely the system of construction to which he alleges that the word "*Singer*" applies, as contrasted with other machines not having these peculiar features. This shews the case to be one to which the remarks of Vice-Chancellor *Hall* apply: "I must look at the whole case to see whether, having regard to all the questions which may be raised upon the hearing, this is a case which ought not to be tried by a jury. . . . Mr. *Benjamin* has said, generally, when you want to fish out and to collect the intent of parties from a series of documents and correspondence, such a case would be better decided upon, and dealt with, by a Judge than by a jury. Having regard to that ingredient in this case, and to the general complexity of the case, it seems to me that, as a whole, this case will be best tried by a Judge": *Garling* v. *Royds* (2).

Sir *H. Jackson*, in reply.

BACON, V.C.:—

I regret that the provisions of the *Judicature Act*, which were meant of course for the general interest, should have given rise to such a question as I have heard argued for a very long time in the course of this morning. The enactments are clear and distinct. The right of the Plaintiffs to have a trial by jury is express. The right of the Defendant, subject to the considerations mentioned in the 26th rule of Order XXXVI., is also very plain, and the Court,

(1) *Ante*, p. 240. (2) 25 W. R. 123.

V.-C. B. 1879 SINGER MANUFACTURING COMPANY v. LOOG.

by the rule I have last mentioned, "may, if it shall appear desirable, direct a trial without a jury, if any question, or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury." The case before me is as plainly a case belonging only to the Court of Chancery before the *Judicature Act* passed as can be conceived. In what respect has the statute altered that? No case has been referred to which leads me to believe that the law has been in any respect altered. The case of *West* v. *White* (1) is referred to, from which of course I do not desire in any degree to withdraw. It was a most plain case, in which there were certain questions of fact which, if the case remains here, must be examined in this Court, but which from their very nature it was convenient should be tried before a jury, and the Court, upon the Defendant's application that he might under the 26th rule have it tried before a jury, yielded to it and directed an inquiry whether the Defendants had carried on their works so as to occasion a nuisance to the Plaintiffs—whether the works in course of erection would create a nuisance, whether the nuisance had existed for twenty years, and whether any damage had been occasioned. Questions more plainly, merely, and simply questions of fact, cannot by any possibility be stated, and the judgment which has been referred to by Sir *Henry Jackson* must be read having regard to the questions which I have read from the issues. But is this case anything like that? In this case I have looked over, very hastily, but sufficiently for the present purpose, the statement of claim and the statement of defence, and in the statement of defence I find a long statement of the differences between the Plaintiffs' machine and the Defendant's machine—difference of construction and difference of form; the 9th paragraph shewing that there are questions of law, and pure questions of law—which are to be decided by this Court; and I am asked to send that to a jury of twelve gentlemen, who are to listen to any evidence given before them, and to draw their conclusions of law—because they must be conclusions of law as well as of fact—from the evidence which may be submitted to them; and what then? I am told it can never come back here.

(1) 4 Ch. D. 631, 636.

But suppose it should come back, with a finding of the jury upon those facts. Is this Court to shut its eyes to the plain evidence in the case? to abandon the duty which is cast upon the Court to decide the law between the parties, because the jury have found certain questions of fact? The old evil which was so much complained of, that people were sent from one Court to another, that expense was increased and burdens were thrown upon suitors, would be perpetuated if I listened to such an application as the present.

In *Spratt's Patent* v. *Ward* (1), although the decision went, as I have said, on a totally distinct point, there are certain observations from which I also do not desire to withdraw. But the words used in the judgment of Vice-Chancellor *Hall*, in the case of *Clarke* v. *Cookson* (2) express, in my opinion, distinctly the principle upon which the Court must act when it finds that in the case submitted for its decision there are questions of law—minute, serious, important questions of law—mixed up with questions of fact, and that it could not help the Court in the discharge of its plain duty to have findings of fact in the particular circumstances insisted upon by the Defendant, and so get rid of, or at least baffle, the Plaintiff in his attempt to obtain what he says is his right.

Now, the issues of fact stated here appear to be these:—

"Whether the word '*Singer*,' as applied to or used in common with sewing-machines, is a trade-mark or designation of the Plaintiffs' machines to which the Plaintiffs are exclusively entitled, and whether the name '*Singer*' is in fact so used by the Plaintiffs, or whether the word '*Singer*,' when applied to a sewing-machine, has acquired in the trade the meaning of, and is used as descriptive of, a machine of a particular class or mode of construction or character." These are questions of fact, no doubt, but questions mixed up with all those topics which are introduced by the defence, and a finding in the Plaintiffs' favour upon this may possibly be utterly useless to the Plaintiffs if the other issues of law are decided in the Defendant's favour.

The second issue proposed is: "Whether the Defendant used or has used the name '*Singer*' for the purpose of appropriating to the machine sold by him the reputation attached to the machines

(1) *Ante*, p. 240. (2) 2 Ch. D. 746, 747.

V.-C. B. 1879 SINGER MANUFACTURING COMPANY v. LOOG.

of the Plaintiff, or merely as a description of the class or character of machines made by the Defendant." That is an inference of law to be drawn from the facts, that is not a question for a jury. The jury have nothing to say to that, and no verdict of the jury would ever bind the rights of the Plaintiffs on such an issue as that.

The third is: "Whether the Defendant, by the use of the name '*Singer*' has induced any person or persons who purchase or have purchased sewing-machines to purchase them as machines manufactured or made by the Plaintiffs or upon the same principle." Now that is also an inference of law. Every man must be held to have done and intended that which is the consequence of the thing which he has done, and a Court of law, and not a jury, is the proper tribunal to decide any such questions as that.

Then I am asked to exercise my discretion under the 26th rule of the Order, a discretion which is not to be exercised arbitrarily and not to be guessed at. I do not say that this, that, or the other point, upon the facts which are at issue between the parties described, and minutely described, in their pleadings, taken by itself, may not have been better decided by a jury. But what I find is, that there is no question of fact in which either the Plaintiffs or Defendant is concerned, which is not so mixed up with other and no less important facts as that it is right that the whole question should be decided by one tribunal—and that one law only—not a verdict on the law, but one law only—should be applied to the issue joined between the parties.

I therefore refuse this motion.

Solicitor for the Plaintiffs: *John Nicholas Mason.*

Solicitors for the Defendant: *Michael Abrahams & Roffey.*

In re WOOLRICH, DECEASED.
HARRIS *v.* HARRIS.

V.-C. H.
1879
Feb. 18.

[1877 W. 23.]

Will—Construction—Gift to Issue of Deceased Children—Original Gift—Substitutional Gift.

A testatrix, by her will, in exercise of a general power, appointed real and personal estate to trustees in trust for her sister *H.* for life, and after her death for all and every her children and child who should be living at her death, if more than one as tenants in common; and provided "that if any child of *H.* should die in the lifetime of *H.*, leaving issue who should be living at the death of *H.*, such issue should take the share which his, her, or their parent would have taken if living at the death of *H.*; and if there should be no child or children, or issue of a child or children of *H.* so living at her death," then the testatrix gave over the fund to other persons. *H.* had one child who was dead at the date of the will leaving issue who were living at her death, and other children who survived her:—

Held, that the gift to issue was original and not substitutional, and that the issue of the child who was dead at the date of the will were entitled to take under it.

ADMINISTRATION ACTION.

The testatrix, *Elizabeth Woolrich*, by her will, dated the 12th of April, 1869, in exercise of a general power of appointment, appointed, devised, and bequeathed real and personal estate to trustees upon trust out of the rents and interest thereof to keep buildings in repair and pay certain small legacies, and then to pay the rents and interest of one moiety of such real and personal estate to her sister *Sarah Harriman* during her life, and after her death to stand possessed of such moiety upon the following trust, *i.e.*, "in trust for all and every the child and children of my said sister *Sarah Harriman* who shall be living at her death, such children to take equally among them, if more than one, as tenants in common, and if but one child only, then for such one child: provided always and I declare that if any child of my said sister *Sarah Harriman* shall die in the lifetime of my said sister leaving issue who shall be living at the death of my said sister, such issue shall take the share or interest which his, her, or their parent would have taken if living at the death of my said

V.-C. H. 1879 *In re* Woolrich, Deceased. Harris v. Harris.

sister: provided always and I declare that if there shall be no such child or children or issue of my said sister so living at the death of my said sister, then" the said testatrix directed that the said moiety should be held upon the trusts by her will declared concerning the other moiety of the said real and personal estate, which were similar trusts in favour of her sister *Ann Fielding*, her children and issue.

The testatrix died on the 17th of August, 1870.

One child of *Sarah Harriman* and one child of *Ann Fielding* had died before the date of the will, each of them leaving issue now living.

Ann Fielding died in April, 1874, and *Sarah Harriman* in November, 1876, and both of them left children now living; and the question now argued was whether the issue of the children who had died before the date of the will were entitled to take under it.

W. Pearson, Q.C., and *F. T. White*, for the Plaintiff, who was one of the surviving children of *Ann Fielding*:—

The gift to issue is substitutional, and as the children who were dead at the date of the will could not take under it, neither can their issue: *Christopherson* v. *Naylor* (1); *West* v. *Orr* (2); *Hunter* v. *Cheshire* (3). It may be contended that *In re Potter's Trust* (4) is an authority against this construction, but that case was disapproved of in *In re Hotchkiss' Trusts* (5).

Dickinson, Q.C., and *Brett*, for the issue of the children who had died before the date of the will:—

This is an original gift to children of a sister of the testatrix living at the death of such sister, and to the issue of any child of a sister dead at that time. In all the cases in which a gift to issue has been held substitutional there has been a primary gift, a reference to some person or member of the class unable to take under the primary gift, and a substitution of his issue in his place. But there is nothing of the kind here. This is an independent gift, and the issue we represent are entitled to take under it.

(1) 1 Mer. 320.
(2) 8 Ch. D. 60.
(3) Law Rep. 8 Ch. 751.
(4) Ibid. 8 Eq. 52.
(5) Law Rep. 8 Eq. 643.

It is incorrect to say that *In re Potter's Trust* (1) was disapproved of in *In re Hotchkiss' Trusts* (2); on the contrary, Vice-Chancellor *James*, in deciding the latter case, distinctly recognised it as an authority; and it is entirely in our favour, as are also *Adams* v. *Adams* (3), *Parsons* v. *Gulliford* (4), *Phillips* v. *Phillips* (5), *In re Smith's Trusts* (6), and *Loring* v. *Thomas* (7).

[They also referred to *Hawkins* on Wills (8) and *Theobald* on Wills (9).]

W. Pearson, in reply, cited *Atkinson* v. *Atkinson* (10).

HALL, V.C.:—

In considering this case it seems to me important to ascertain in the first instance what is the true construction to be put upon that part of the will which provides for the issue of *Sarah Harriman* who should die in the lifetime of her (the testatrix's) said sister leaving issue; whether according to the true construction of this will that is a substitutional or an original gift. The Master of the Rolls, in the case of *Christopherson* v. *Naylor* (11), described the gift there as a substitutional gift, and that case is an authority which upon that point, as upon all points, I do not mean to call in question. That, however, was the case of a substitutional gift. So in *West* v. *Orr* (12) the gift was substitutional, the substitution consisting in this, that according to the frame of the will there, the gift was to such of the children of the testator's late sisters *Margaret* and *Mary* as should survive his wife, and being males should attain the age of twenty-one years, or being females should attain that age or marry under that age, "but in case any of such children shall be dead at my decease leaving lawful issue, then I direct that such issue shall take (and if more than one in equal shares as tenants in common) the share of their deceased parent." There the issue who were substituted for the children were issue who were to take something in the place of

(1) Law Rep. 8 Eq. 52.
(2) Ibid. 643.
(3) Ibid. 14 Eq. 246.
(4) 10 Jur. (N.S.) 231.
(5) Ibid. 1173.
(6) 5 Ch. D. 497, n.
(7) 1 Dr. & Sm. 497.
(8) Page 249.
(9) Page 349.
(10) Ir. L. R. 6 Eq. 184.
(11) 1 Mer. 320.
(12) 8 Ch. D. 60.

V.-C. H. 1879 *In re* WOOLRICH, DECEASED. HARRIS *v.* HARRIS.

"such children," that is to say, they were substituted for the original donees, in whose place they were to take. Now, if we look at this will, there are no words here providing that the issue of deceased children are to take in the place of persons included in the preceding gift, and to take that which was given to such persons, or in any corresponding way, but the child of a deceased child is to take the share and interest which "his, her, or their parent would have taken if living at the death" of the testatrix's sister. The frame of this clause does not suppose first of all a gift to somebody, and then a displacing of that somebody, and a substitution of somebody else, but is in reality a gift to a certain class of persons of that which some other persons would have taken under a certain state of circumstances, but cannot in fact take. In many cases the frame of clauses such as the present leads to an absurdity if literally taken, because it is an absurdity to begin by describing a person who does not take, and then say that he is to take the share of some other person who does not take; and in such cases it is necessary to modify the words of description. But there is no difficulty of that kind here; because it is possible to take the words in their reasonable and natural sense, and they do not require modification.

In *West* v. *Orr* (1) the gift over was treated as substitutional, because it was a gift to persons described by reference to those comprised in the preceding or original gift. It was upon the frame of the gift over in that case first supposed (though erroneously supposed) that there was a gift to somebody, and that gift was then treated as transferred to somebody else; that is, there was a substitution of somebody else.

That being so, is this an original or substitutional gift? It appears to me that, upon the words of the will, it is an original gift to these persons. There is no magic in the words "I declare that," or "provided always," and so forth. The only question to be decided is, whether, upon a sound construction of the entire gift, such gift is original or substitutional. For this purpose I will only refer to the case of *Martin* v. *Holgate* (2), a case which was much considered.

In that case the gift was to trustees upon trust to pay the

(1) 8 Ch. D. 60. (2) Law Rep. 1 H. L. 175.

proceeds to the testator's wife for life, and "after her decease to distribute and divide the whole amongst such of my four nephews and nieces (naming them) as shall be living at the time of her decease" (so that the original gift corresponded to the original gift here, the only difference being that the children were numbered, while here the gift is to the children living at the death), "but if any or either of them should be then dead leaving issue, such issue shall be entitled to their father's or mother's share;" even there, where the words were "any or either of them," which might have been considered to narrow the construction and to make the gift substitutional, yet the House of Lords held, and clearly laid down, that it was an original gift. Therefore I hold that upon the true construction of this will the gift is original, and not substitutional. Taking that view of the case, supposing I had to construe this particular will without any other authority than those which bear upon the construction to be put upon words importing futurity, such as the words "if any of the children of my said sister shall die in the lifetime of my said sister leaving issue," there is clear authority for holding that those words "shall die" must be read and construed as equivalent to "shall have died," or "shall be then dead," and not limited to death after the date of the will.

That being so, considering this gift as an original gift to children living at the death of the sister of the testatrix, and to the issue of any child of the sister dead at that time, the children of a child dead at the date of the will are clearly objects of the gift, within the precise and accurate meaning of the words; and the natural and ordinary meaning of the instrument must be given effect to, unless the authorities are against that view. Then, how do the authorities stand? It is said that the case of *Christopherson* v. *Naylor* (1) is an authority for not letting in the children of a child dead before the date of the will. That case was so carefully examined and accurately explained by the Vice-Chancellor *Kindersley* in the case of *Loring* v. *Thomas* (2), that I accept and adopt his explanation. He says, "It appears to me, from the reasons given by the Master of the Rolls, that if the words in that case had been the same as in this case, not speaking of the legacy intended for the child, but the legacy the child

(1) 1 Mer. 320. (2) 1 Dr. & Sm. 497, 520.

V.-C. H. 1879 *In re* WOOLRICH, DECEASED. HARRIS *v.* HARRIS.

would have taken if living at the testator's death, his decision would have been different. The language of the two wills is at any rate very distinguishable." It appears to me, therefore, so far as that authority is concerned, that it is a clear and precise authority in favour of letting in the children of a deceased child. *Loring* v. *Thomas* (1) has never, so far as I am aware, been overruled. With reference to the case of *In re Potter's Trust* (2), which has been commented on, that case was clearly confirmed by Vice-Chancellor *James* in *In re Hotchkiss' Trusts* (3), for he there said, "I think that this case is clearly within the rule of *Christopherson* v. *Naylor* (4), which I hold to be still a binding authority; and I consider it does not come within any of the distinctions which have been taken in the cases to which I have been referred, where the rule of *Christopherson* v. *Naylor* was held to be excluded. At the same time," he added, "in following *Christopherson* v. *Naylor* I do not think I am overruling *In re Potter's Trust*, there being, as it seems to me, a substantial distinction between the two cases."

That was a clear recognition of *In re Potter's Trust* as a binding authority.

Therefore it appears to me on those authorities (without going through the other cases cited, such as *In re Chapman's Will* (5) and *In re Smith's Trusts* (6), which all tend in the same direction or are certainly not adverse to it), that the construction I have arrived at is the true one. It is said that the authority of *In re Hotchkiss' Trusts* is adverse. With reference to that, I have said all I need say, the Vice-Chancellor there having apparently approved of *Christopherson* v. *Naylor*, and held it to be a binding authority. Having said, therefore, that I do not mean to question the authority of *Christopherson* v. *Naylor*, I need not say more.

Then, with reference to *West* v. *Orr* (7), I observe that the Lord Justice *James* in that case said, "If the words in this will had been 'but in case any of such children shall be dead at my decease leaving lawful issue, then I direct,' then, possibly, it might have been considered that we could have said that this was not a substitutional class." I have already said what I

(1) 1 Dr. & Sm. 497.
(2) Law Rep. 8 Eq. 52.
(3) Ibid. 643, 650.
(4) 1 Mer. 320.
(5) 32 Beav. 382.
(6) 5 Ch. D. 497, 501.
(7) 8 Ch. D. 60, 65.

V.-C. H.
1879
In re WOOLRICH, DECEASED.
HARRIS *v.* HARRIS.

need say about that being a substitutional clause. If I am right in my construction with reference to that, then it follows almost from what the Lord Justice *James* said, that these parties would be let in here if they could have been let in in the more difficult case where the words were, "in case any of such children shall be dead at her decease leaving lawful issue," that being a description of children who could not in fact take. That case itself was the wholly special case of a gift defining two periods for ascertaining the persons to take, and on any construction having nothing to do with the present case. It does not appear to me that that case militates against a construction which lets in children of deceased children in a case like the present. I do not at all question the justice of the observations of the Lord Justice *Thesiger*, because, as I have already said, I adopt fully the case of *Christopherson* v. *Naylor* (1), though I do not apply it to the present case. It appears to me that, consistently with authority, this is a case in which, having regard to the words themselves without any authority (except such authority as bears upon the construction of the words "shall die"), the children of the two children of *Sarah Harriman* and *Ann Fielding* who were dead at the date of the will must be let in to take under it.

Solicitors: *Cooke & Jonas*, agents for *Saben, Stone, Staffordshire; Chester & Co.*

In re HARGREAVES' TRADE-MARK.

V.-C. H.
1879
Feb. 27.

Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91)—*Class* 42 *of* 1*st Schedule to the Rules—Bacon and Hams—"Anchor Brand"—Old and New Trade-Marks, Registration of—"Leave of the Court."*

There being under the *Trade Marks Registration Act*, 1875, four trade-marks including an anchor registered in respect of goods in Class 42 of the 1st schedule to the Rules made under the Act, the Court refused to give leave to the Registrar to register a new trade-mark including an anchor in respect of goods in the same class, but different in character from those goods for which the four trade-marks had been registered.

JOHN HARGREAVES, of *Liverpool*, provision merchant, on the 14th of January, 1879, sent to the Registrar of Trade-Marks

(1) 1 Mer. 320.

V.-C. H. 1879

In re HARGREAVES' TRADE-MARK.

an application to be registered as the proprietor of a trade-mark consisting of the words "*Anchor Brand*" surmounting a representation of an "anchor," and he applied that the same might be registered in respect of goods, "Substances used as food," Class 42 of the 1st schedule to the Rules under the *Trade-Marks Act*, 1875 (38 & 39 Vict. c. 91), *i.e.*, Bacon and Hams.

The Registrar, on the 1st of February, wrote to *Hargreaves* to say that the mark was not of that special and distinctive form which would make it a satisfactory sign to associate with his business; and he pointed out that in the Index of Marks in Class 42 he would see several marks consisting in part of an "anchor" of which the forms bore considerable resemblance to his proposed mark; and suggested that *Hargreaves* should adopt a mark which should be so distinct from those already on the register for other owners in Class 42, that the public might at once be able to recognise it as that specially associated with his business in particular goods; and he, in a letter of the 10th of February, pointed out that four marks of the same description were on the register, and that in view of the provisions of sect. 6 of the Act of 1875, that "The Registrar shall not without the special leave of the Court .... register in respect of the same goods or classes of goods a trade-mark identical with one which is already registered with respect to such goods or classes of goods, and the Registrar shall not register with respect to the same goods or classes of goods a trade-mark so nearly resembling a trade-mark already on the register with respect to such goods or classes of goods as to be calculated to deceive;" and of rule 19, made under it, he was unable, except by leave of the Court, to register the "*Anchor*" as a new trade-mark.

Hargreaves deposed that the marks referred to by the Registrar had been registered in respect of, 1, biscuits for feeding dogs and other animals, and biscuits generally; 2, cattle food, &c.; 3, butter; and 4, imported articles of food, viz., preserved fish, vegetables, and meat, also fresh meat and shell-fish; and that none of the articles for which an "anchor" was registered resembled bacon or hams; and he stated that he had a large business in the provision trade, and imported large quantities of bacon and hams, which were packed in boxes, and that he had for

some time past used this trade-mark which had become well known in the trade. He alleged that to alter the mark as suggested by the Registrar would greatly interfere with and prejudice his business, and therefore he submitted that he could not make any alteration.

This was a motion on behalf of *Hargreaves* that the leave of the Court might be given to the registration of the mark, and that the register of trade-marks might be rectified by entering therein the name of *Hargreaves* as the proprietor of the trade-mark above mentioned, as belonging to bacon and hams in Class 42. It appeared that the mark had been adopted by *Hargreaves* since the passing of the Act in August, 1875. Not one of the four marks registered was identical with *Hargreaves'* mark, but each of them was an anchor with words or initials. There was evidence to this effect—that the words "Preserved Meats" (one of the nineteen articles mentioned in Class 42) had a well-known meaning in the provision trade, and applied solely to meats, both fresh and cooked, imported in tins, and not to bacon or hams, or produce of a similar character, and that the public would not be deceived by the use of the mark for bacon and hams to the prejudice of any of the proprietors of the other four marks registered.

Lawson, for the motion:—

The question is, assuming that this mark is so nearly resembling those already registered as to be calculated to deceive, which is not admitted, whether or not a mark used for one description of goods in a class is to be considered as calculated to deceive because there are similar marks already on the register for other goods in the same class. The principle laid down in *In re Farina* (1) is applicable here, the test being that not one of the proprietors of the four marks registered can prevent *Hargreaves* from using his mark for bacon and hams, goods very different from those for which the four marks have been registered. *Seixo* v. *Provezende* (2). The only possibility of a mistake being made by a purchaser would be as to the use of the words "Preserved Meats," but the evidence shews that those words apply only to meats in tins. The observations made in the case of *Cope* v. *Evans* (3) are applicable here. As to

(1) 26 W. R. 261. (2) Law Rep. 1 Ch. 192.
(3) Law Rep. 18 Eq. 138.

V.-C. H. 1879 — *In re* HARGREAVES' TRADE-MARK.

the supposed rule that there may not be more than three similar marks registered for articles in the same class, it would seem from the decision in *In re Walkden Aërated Waters Company*, which was before the Master of the Rolls in June, 1877 (*Sebastion* on the Law of Trade-Marks), that that applies to a new mark, and that any number of old marks may be registered. The observations in that case are to some extent in favour of this application, because they shew that there may be more than one mark in any class in which the articles of trade are so widely different as in Class 42. But there really is nothing in the Act of 1875, or in the Rules made under it, which shews that any such rule as that suggested exists.

[HALL, V.C.:—There is no such rule; but it appears that there have been some instructions from the Commissioners of Patents to that effect.]

The rule might be convenient, but only where there would be a possibility of a purchaser being deceived. It would be unmeaning to apply it generally.

Rigby, for the Registrar of Trade-Marks:—

The rule which has been referred to has not only been established in the form of an instruction from the Commissioners of Patents, but has been adopted by the Courts in numerous cases not yet reported, and it has consequently become law. The rule applies to old marks, and it is that there shall not be registered more than three marks of substantially the same sort, for if there are more than three, they are no longer distinctive, but common. Three new marks cannot be registered in any class, as new marks must all be distinctive. The case of *In re Walkden Aërated Waters Company* was that of a new mark, and there being two similar marks for the same article in the same class already registered, the Master of the Rolls required the applicant to obtain the consent of the proprietors of those two registered marks to his being put on the register. The case of *In re Hyde & Co.'s Trade-Mark* (1) was before the Master of the Rolls, and he said that the trade-mark registered had ceased to be a trade-mark many years

(1) 7 Ch. D. 724.

V.-C. H. 1879 *In re* HARGREAVES' TRADE-MARK.

before 1875; that the words registered had been used by others, and did not distinguish one man's goods from another, and that the trade-mark must be taken off the register. In that case there had been an exclusive user for many years. The Registrar will not register more than three similar old marks, and if he knows of four he will not register one of them. *Hargreaves'* being a new mark, the question is, Can the class be subdivided to allow of registration for bacon and hams? To avoid difficulties with regard to old marks, it has been decided that the classes may be subdivided. In *In re Berry & Co.* (the cross-summons to *In re Rabone Brothers & Co.* (before the Master of the Rolls, Feb. 15, 1879) registration was allowed for part of a class, and user was confined to certain colonies; and since the decision in *In re Brook* (1) registration has been allowed for cotton thread only. It was carried a point further in *In re Jelley, Son, & Jones* (before the Master of the Rolls, May 18, 1878), where the application was to register a trade-mark in Class 5 as a new mark in respect of wire fencing; in Class 12, as a new mark in respect of files and many other articles; and in Class 13 as an old mark in respect of screw wrenches and many other articles; and it being opposed, it was, after argument, held, upon the evidence, that the applicants were entitled to register it as an old mark in Class 13 in respect of all the articles, and as a new mark in Class 5 in respect of wire fencing, but not as a new mark in Class 12, as the applicants had not applied the mark to articles in that class, and the mark resembled that of his opponents, who had on the register a trade-mark which they had applied to similar articles in Class 12, and therefore to allow the applicants to register it in that class would be calculated to deceive the public. And in the case of *In re Whiteley* (before the same learned Judge on Feb. 8, 1879) a limit was directed to be placed on the user, and that was to be notified on the register. There is also the case of *Ex parte Barrow & Co.*, which was before the Master of the Rolls on May 11, 1877, where it was held that the proprietor of an old trade-mark might have it registered for part of a class only; and leave was given to the manufacturers of tin plates, turn-plates, and sheet-iron to have their trade-mark registered for tin plates and turn-plates

(1) 26 W. R. 791.

V.-C. H. 1879 *In re* HARGREAVES' TRADE-MARK.

only. Is there any reason for extending the indulgence to new marks? If it be done, the practical result will be an endless subdivision of the classes.

Lawson:—It is submitted that the rule referred to is arbitrary, and outside the Act of 1875 and the rules made under it, and the applicant here asks for an order under the 7th section of the Act and those rules. It appears that the case of *In re Walkden Aërated Waters Company* is the only one in which the rule which the Registrar seeks to apply can be found; but the circumstances in that case differ from those in the present, as all kinds of aërated waters would probably be sold by the same trader, but in Class 42 the subdivisions are widely different.

HALL, V.C.:—Where a class has been allowed to be divided in the case of an old mark, has the subdivision given as an example been allowed to be divided?

Rigby:—Yes, that was done in the case of *In re Jelley, Son, & Jones* in regard to Classes 12 and 13, but the Court has not been much influenced by those subdivisions. I may observe that, so far as my instructions and my own experience as counsel for the Registrar in the majority of these cases enable me to speak with authority, the instructions to the Registrar apply only to old marks, and that he is bound by the Act of 1875 and the Rules made under it in regard to new marks. The present is a new case as to whether any relaxation of the Act of 1875 can be allowed in respect of a new mark.

HALL, V.C.:—

The Court has a discretion given to it by force of the words in the 6th section of the Act and the 19th rule, "without leave of the Court." The Court, in exercise of the discretion, must have regard to the circumstances of the particular case. The general law being that you must only have one mark of one kind on the register without the leave of the Court, the *onus* is upon those who ask for leave, and they must make out a case, and a substantial and good case. The person selecting a new mark has nothing to do but to ascertain all the marks (which it must be

supposed he is capable of doing) which have been registered as to goods in the class, and he can then select another mark which would lead to no inconvenience whatever. In regard to this case, no less than four marks of the "anchor" have actually got on to the register as new marks apparently—at all events they are on the register either as old marks or as new marks: there may be some of one and some of the other—and the distinction which has been attempted to be made between the different characters of the goods for which this mark is now sought to be registered and the other descriptions of goods for which it has been already registered is not, I think, so clear that I ought, in the exercise of my discretion, to give the leave asked for. The Registrar's costs of this application must be paid by the applicant, subject to the rule laid down in the case of *In re Brandreth's Trade-mark* (1), where it was held that the costs of proceedings in the Registrar's office could not be included, such proceedings not being proceedings in the High Court of Justice.

Solicitors for Applicant: *Burton, Yeates, & Hart,* agents for *Tyrer, Kenion, Tyrer, & Simpson, Liverpool.*

Solicitors for the Registrar: *Hare & Fell.*

(1) 9 Ch. D. 618.

FRY, J.

1879

March 27.

In re RICHARDS & Co.

Company—Winding-up—Judgment Creditor—Stay of Execution—Companies Act, 1862, *ss.* 85, 163—*Bankruptcy Act*, 1869, *s.* 87—*Judicature Act*, 1875, *s.* 10.

A creditor of a company obtained judgment on the 4th of November, 1878, but delayed issuing execution on the representation of the company that they would pay, and did not intend to present a winding-up petition.

On the 28th of November the company presented a winding-up petition, and subsequently an arrangement was made by the company with the statutory majority of creditors, under the *Joint Stock Companies Arrangement Act*, 1870, for a composition, subject to the obtaining the sanction of the Court required by that Act.

The judgment creditor dissented from the arrangement, and moved for liberty to issue execution notwithstanding the petition and arrangement.

The Court declined to sanction the arrangement, and gave leave to the judgment creditor to issue execution.

Sect. 87 of the *Bankruptcy Act*, 1869, which deprives execution creditors, where the sheriff has notice of a bankruptcy within fourteen days, of the fruits of their execution, is not applied to the winding-up of companies by the *Judicature Act*, 1875, s. 10.

In re Printing and Numerical Registering Company (1) not followed.

ON the 4th of November, 1878, a writ was issued against a company styled *Richards & Co., Limited*, at the suit of *Robert Crawshay*, of *Cyfather Castle*, near *Merthyr Tydfil*, to recover the sum of £1260 2*s.* 3*d.* and interest, and on the 18th of November, 1878, an order was made that the Plaintiff should be at liberty to sign final judgment in the action for the amount indorsed on the writ with interest and costs, but execution was not to issue on such judgment for a week.

Such part of this order as directed that execution was not to issue on such judgment for a week was inserted at the instance and upon the express request of the company.

On the 21st of November, 1878, Mr. *Todd*, one of the members of the firm of solicitors then acting for the company in the action, called on Mr. *Crawshay's* agent and stated that he had just come from a board meeting of the company, and that the company could not pay the whole amount of the said judgment on the 26th

(1) 8 Ch. D. 535.

of November, but offered, if the Plaintiff *Robert Crawshay* would abstain from issuing execution on his judgment on that day, to pay £500 on that day, and to pay the balance within one month from that date, and the Judge came to the conclusion on the evidence that he also represented that the company did not intend to present any petition to wind up.

The company's solicitors wrote to Mr. *Crawshay* a letter on the 21st of November, 1878, embodying the verbal offer.

After this a further correspondence took place between Mr. *Crawshay* and the agents of the company, which, in the opinion of the Judge, did not in any way vary the terms offered by the company in their letter of the 21st of November, and on the balance of the evidence the Judge was of opinion that the company had made a representation that they did not intend to present a winding-up petition, and that Mr. *Crawshay* was induced by the company to abstain from issuing execution on his judgment on the 26th of November.

A creditor's petition to wind up the company was presented on the 27th of November, 1878, by the *Aberdare Rhondda Steam Coal Company*, and on the 28th of November the company presented a winding-up petition.

On the 9th of December, 1878, Mr. *Crawshay* gave notice of a motion that he might be at liberty to issue execution notwithstanding the winding-up. The petition and motion both stood over that some arrangement might if possible be made by the company with its creditors under the *Joint Stock Companies Arrangement Act*, 1870 (33 & 34 Vict. c. 104), and eventually an arrangement was agreed to by all the creditors of the company except Mr. *Crawshay*, by which a composition of 4*s.* 6*d.* in the pound was to be paid. Such arrangement was agreed to by a statutory majority of the creditors and only required the sanction of the Court under sect. 2 to be binding on all the creditors.

The motion of Mr. *Crawshay* asking that he might issue execution and the winding-up petition now came on to be heard together, and the principal question argued was whether Mr. *Crawshay* was prevented from issuing execution, having notice of the winding-up petition, in the same way as a creditors' execution is void as against a bankruptcy if the sheriff has notice of the

FRY, J. 1879 *In re* RICHARDS & Co.

bankruptcy petition within fourteen days after sale under sect. 87 of the *Bankruptcy Act*, 1869.

Glasse, Q.C., and *Maclean*, for the motion:—

If there had been an existing winding-up Mr. *Crawshay's* execution on his judgment would not have been restrained under the 85th or 163rd section of the *Companies Act*, 1862: *In re Great Ship Company* (1); *In re London Cotton Company* (2); *In re Dublin Exhibition Palace Company* (3); *In re Imperial Steam Company* (4); *In re Railway Steel and Plant Company* (5); and the 10th section of the *Judicature Act*, 1875, cannot affect the question: *In re Railway Steel and Plant Company; In re Coal Consumers Association* (6); *In re Albion Steel and Wire Company* (7).

Pearson, Q.C., and *Plummer*, for the majority of the creditors who had consented to the arrangement, relied on *In re Printing and Numerical Registering Company* (8) as an express decision that the bankruptcy rule as to executions was applied to the winding-up of companies by the 10th section of the *Judicature Act*, 1875.

Speed (*Higgins*, Q.C., with him), for the company.

Bristowe, Q.C., and *Cozens-Hardy*, for the *Aberdare Rhondda Steam Coal Company*.

Millar, and *Deane*, for debenture holders.

FRY, J., after stating the facts, continued:—

The question before me is whether I should sanction the compromise made between this company and its creditors, which is not valid unless confirmed by the Court. Now, the company having, in my opinion, represented to Mr. *Crawshay* that if he gave them the indulgence they asked they would not present a petition to wind up, were in duty bound to give him the earliest possible

(1) 4 D. J. & S. 63. 10 Jur. N.S. 3.
(2) Law Rep. 2 Eq. 53.
(3) Ir. L. R. 2 Eq. 158.
(4) 37 L. J. (Ch.) 517.
(5) 8 Ch. D. 183.
(6) 4 Ch. D. 625.
(7) 7 Ch. D. 547.
(8) 8 Ch. D. 535.

information if they altered their mind and determined to present such a petition.

However, the company did present such a petition, and Mr. *Crawshay* thereupon gave notice of a motion that he might be at liberty to issue execution notwithstanding the petition. The petition and motion have stood over, but the rights of the parties are not affected thereby, and an agreement having been made between the company and its other creditors, under the Act of 1870, which will bind Mr. *Crawshay* if sanctioned by the Court, I have to consider whether, under the circumstances of this case, I should give or withhold that sanction.

As a general rule, I think the Court should not sanction such an arrangement if it would prejudice a creditor whose rights would have been preferential if the petition had been carried on; and thus the further question arises, whether the Court would have let *Crawshay* issue execution if the winding-up order had been made.

This question divides itself into two further questions: first, how the matter would have stood before the *Judicature Act*, 1875; and, secondly, how it stands since the passing of that Act. There is a series of decisions cited by Mr. *Glasse* which shew that the Court will not allow a creditor, who has been induced by a company to give them an indulgence by forbearing to proceed to judgment or execution, to lose the benefit which he would have obtained by active prosecution of his claim. And it would be an evil day for both creditors and companies if it were decided that creditors who granted such an indulgence thereby lost the benefit of their judgments. Nor does it seem to me that it makes any difference whether the petition is presented by the creditors or by the company.

Therefore I am of opinion that if there had been a winding-up the Court would nevertheless have given leave for this execution to be issued, and it follows that I ought not now to sanction the arrangement which would be inconsistent with such leave, unless the *Judicature Act* has altered the practice.

The question, therefore, resolves itself into this, whether sect. 87 of the *Bankruptcy Act*, 1869, by which an execution creditor for more than £50 loses the benefit of his execution if the sheriff,

FRY, J. 1879 *In re* RICHARDS & Co.

within fourteen days after a sale, has notice of a bankruptcy petition, applies to a company in liquidation.

The Master of the Rolls, in *In re Printing and Numerical Registering Company* (1), held that that section did apply, because the 10th section of the *Judicature Act*, 1875, provides that "in the winding-up of any company under the *Companies Act*, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." But Vice-Chancellor *Malins*, in *In re Coal Consumers Association* (2), held that the 10th section of the *Judicature Act* did not apply to a landlord's right of distress, but was only intended to apply in a winding-up the same process of administration as in bankruptcy; and it was held by Vice-Chancellor *Hall*, in *Ex parte Railway Steel and Plant Company* (3), that the right of an execution creditor in a similar case was not affected by that section; and in *In re Albion Steel and Wire Company* (4) the Master of the Rolls himself held that the 10th section means simply that the rules in bankruptcy shall apply so far as relates to the proof and receipt of dividends out of the assets of the company, and not that all the rights and rules of administration under the *Bankruptcy Act* shall apply to the case of a company in liquidation.

And though I differ, with great regret, from the decision of the Master of the Rolls in *In re Printing and Numerical Registering Company*, it appears to me that there is an initial difficulty in holding that the 87th section of the *Bankruptcy Act* is applied by the 10th section of the *Judicature Act*, for the effect of the *Bankruptcy Act* is that the sheriff must hold his hand during fourteen days from the sale, and for a further period until the petition in bankruptcy of which he has notice is heard. But the 10th section of the *Judicature Act* only applies to companies whose assets prove to be insufficient for payment not only of liabilities but also of the

(1) 8 Ch. D. 535.
(2) 4 Ch. D. 625.
(3) 8 Ch. D. 183.
(4) 7 Ch. D. 547.

costs of winding up. Now there are some windings up which are not equivalent to bankruptcies, and the sheriff cannot possibly know, at any rate, what the costs of the winding-up will be, nor whether the assets will be insufficient to meet them, until a late period in the proceedings to wind up; and this consideration would impose a much longer period of suspense than is imposed in the case of bankruptcy by the 87th section of the *Bankruptcy Act*. In addition to that, I think that, as the Master of the Rolls said in the judgment I have quoted, the 10th section of the *Judicature Act* was only intended to introduce the same rules of administration as in bankruptcy; and therefore, on both these grounds, I hold that the 87th section of the *Bankruptcy Act* is not to be applied so as to interfere with the rights of Mr. *Crawshay*, and I therefore decline to sanction the scheme of arrangement between the company and their creditors.

Solicitors for Creditors: *Speechley, Mumford, & Co.*
Solicitors for Company: *Baxters & Co.*
Solicitor for Mr. *Crawshay: Wrentmore.*
Solicitors for Debenture Holders: *Lyne & Holman; Ingledew, Ince, & Greening.*
Solicitors for Petitioning Creditor: *Whites, Renard, & Co.*

CONSTABLE *v.* CONSTABLE.

[1871 C. 195.]

Rent—Apportionment—Real and Personal Representatives—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35), *s.* 2—*Will executed before Act—Codicil executed after Act—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

The *Apportionment Act*, 1870, applies to every will executed before, and confirmed by a codicil executed after, its passing; and, *semble*, also to every will coming into operation after its passing.

A testator, by a will executed before the passing of the *Apportionment Act*, 1870, bequeathed his residuary personalty to trustees upon certain trusts: and he devised his real estate to trustees on certain trusts, and, subject thereto, to his son for life, with remainders over in strict settlement. But he provided that his son should not take any estate under the will unless

FRY, J.

1879.

CONSTABLE v. CONSTABLE.

he, within a year after the testator's death, executed a settlement of certain other real estate, upon limitations corresponding to those created by the will of the devised real estate. And the testator gave the clear and undisposed of rents of his real estate to trustees, upon trust for the son, if he should make the settlement required of him within the year, and, if not, then upon trust for the persons who would thereupon become entitled to the devised real estate. By a codicil, executed after the passing of the Act, the testator made some alterations in his will, and in all other respects confirmed it. The son executed the settlement required of him within a year after the testator's death:—

Held, that the rents of the devised real estate accruing due at the time of the testator's death must be apportioned between the son and the persons interested in the residuary personalty.

Hasluck v. *Pedley* (1) followed.

FURTHER CONSIDERATION.

This was a suit for the administration of the real and personal estate of Sir *Thomas Aston Clifford Constable*, Bart.

He, by his will, dated the 4th of December, 1869, bequeathed the residue of his personal estate to trustees, upon certain trusts, and he devised all his real estates to his trustees in fee, upon certain trusts, and, subject thereto, he devised and appointed that all his real estate should be held by his trustees upon the trusts thereinafter mentioned, (that is to say) he devised and appointed the same to the use of his son, the Defendant, and his assigns for his life, with remainder to the use of his first and every other son successively in tail male, with divers remainders over, and with an ultimate remainder to the use of the testator's right heirs for ever. The will contained a recital that the testator had, after his marriage with his first wife, executed a post-nuptial settlement of certain real estates situated in the *North Riding* of *Yorkshire*, under which settlement his son, the Defendant, was entitled, at the testator's death, to an estate in tail, and the testator declared that it should be a condition precedent to his son or his issue taking any estate under the will and the limitations thereinbefore contained in any real estate by the will appointed, given, or devised, that, within twelve months next after the testator's decease, he should execute a disentailing deed of the hereditaments comprised in the post-nuptial settlement, and should settle the same to the use of himself and his assigns for his life, with remainders over

(1) Law Rep. 19 Eq. 271.

corresponding to the uses by the will declared of the real estate thereby devised and appointed. And, in case the son should decline or neglect to make, within twelve months next after the death of the testator, the settlement thereby required to be made by him of the hereditaments comprised in the post-nuptial settlement, then (unless his said son should die within the twelve months leaving issue surviving him, in which case the proviso requiring a settlement to be made by him should be null and void) the limitations thereinbefore contained of the testator's devised and appointed real estate, to take effect on the death of his said son and failure of his issue, should be accelerated, and should take effect as if his said son had actually died at the end of the twelve months without having had any issue. And the testator gave the clear and undisposed of rents and profits of his appointed and devised real estate unto his trustees, until his son should make the settlement required to be made by him in case he should make the same within the said twelve months, or otherwise until the expiration of such twelve months, In trust in the former alternative for his said son, and in the latter alternative upon the trusts and in manner in which the same would have gone in case the then accelerated limitations of the will had taken effect immediately on the testator's decease. The testator executed a codicil to his will, dated the 30th of March, 1870, which did not affect any of the provisions of the will hereinbefore stated, and in all other respects he confirmed his will. He executed a second codicil to his will, dated the 5th of November, 1870, whereby he made a different disposition of some real estate situate in *Middlesex*, but did not in any other way alter any of the provisions of the will hereinbefore stated. And in all other respects, and as not altered by that codicil, the testator confirmed his will and first codicil. The testator died on the 22nd of December, 1870. The Defendant executed the settlement required by the will within twelve months after the death of the testator. An administration decree having been made, and the Chief Clerk having made his certificate, the question now arose whether the rents of the devised real estate accruing due at the time of the testator's death belonged entirely to the Defendant, or whether they ought to be apportioned between him and the trustees of the residuary personalty.

FRY, J.
1879
CONSTABLE
v.
CONSTABLE.

Higgins, Q.C., and *Yate Lee*, for the Plaintiff.

Glasse, Q.C., and *Nalder*, for the Defendant:—

The *Apportionment Act* of 1870 does not apply. The will was made before the Act was passed, and the confirmation of it by the second codicil, which was made after the Act was passed, cannot alter the construction of the will: *Jones* v. *Ogle* (1). The will gives the clear and undisposed of rents to the Defendant, and that is in effect an express direction that there is to be no apportionment. And the Defendant has given valuable consideration, in executing the re-settlement of the property comprised in the testator's post-nuptial settlement. *Hasluck* v. *Pedley* (2) does not apply.

J. Pearson, Q.C., and *C. C. Barber*, for the persons interested in the residuary personalty:—

The Act of 1870 was intended to apply to every will coming into operation after it was passed, unless the will contained an express direction to the contrary. *Jones* v. *Ogle* is explained by Vice-Chancellor *Malins* in *Capron* v. *Capron* (3), and *Hasluck* v. *Pedley* shews that, though the Act does not alter the construction of a will made before it was passed, it has altered its legal effect. Moreover, by sect. 24 of the *Wills Act*, a will is, with reference to the estate comprised in it, to speak as if executed immediately before the testator's death, unless a contrary intention appear.

Glasse, in reply.

FRY, J.:—

Down to the *Apportionment Act* of 1870 there was no apportionment of rent in respect of time, except under the operation of certain statutes which do not apply to this case. By the Act of 1870 all rents are made apportionable, and are to be deemed as accruing from day to day.

(1) Law Rep. 8 Ch. 192. (2) Law Rep. 19 Eq. 271.
(3) Law Rep. 17 Eq. 288.

[After stating the provisions of the will and codicil, his Lordship continued :—]

The question I have to determine is this, what are the "clear and undisposed of rents and profits?" If they are the clear and undisposed of rents and profits, as they would have been supposing that the testator had died immediately after the making of his will, they would have included the whole rents without apportionment; but if, on the other hand, they are to be treated as if the testator's will speaks from the date of his death with regard to the construction to be put upon those words, then of course the *Apportionment Act* applies, and the clear and undisposed of rents do not include anything but the rents accrued since the death of the testator, and the other apportioned part of the rents down to his death goes to the personal estate. That is the question which I have to determine.

It appears to me that, according to the true construction, these rents ought to be apportioned. The *Apportionment Act* is, as has been already observed by Judges who have had to construe it before myself, very general in its words. It enacts that from and after the passing of the Act rent shall be apportioned as if it were interest, and as if it accrued from day to day. That lays down a general principle upon which everything is to proceed, and I think, therefore, that it would be a very narrow construction to hold that it did not apply to every instrument coming into operation after the passing of the Act. I think that in this case that conclusion is confirmed by two considerations. One is that the testator after the passing of the Act made a codicil confirming his will, in effect, therefore, causing his will to speak from the date of that codicil. The other consideration, which I cannot entirely lay aside, is this, that by the 24th section of the *Wills Act* it is enacted that "every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Now, if I inquire, as at the date of the death of this testator, what was the personal estate which passed by his will, I find that that personal estate must have included the apportioned part of

FRY, J.
1879
CONSTABLE
v.
CONSTABLE.

the rents down to his death, and, if the personal estate did include that apportioned part, then it follows that that apportioned part was not undisposed of, because in fact it had gone as part of the personal estate.

Two cases which have been referred to certainly throw considerable light on the views of other Judges on this particular question; I mean *Capron* v. *Capron* (1), before Vice-Chancellor *Malins,* and *Hasluck* v. *Pedley,* before the present Master of the Rolls. In the latter case the Master of the Rolls used this language (2), which I adopt: "The Act does not affect the meaning of the will; it only alters its legal operation. A devise of *Blackacre,* before the Act, carried the accruing rents: now it does not: not because the meaning of *Blackacre* has been altered, but because the legal effect of the devise is different." So here it appears to me that the bequest of the personal estate operated upon something upon which, but for the Act, it would not have operated. And, inasmuch as the testator desired to deal with the rents accruing during twelve months, or until the execution of the settlement, which should come to the trustees (because that, I think, is the real subject-matter of the bequest), and the Act has altered the amount of rents coming to them, it may well be said that the will of the testator is not affected as regards construction by the *Apportionment Act,* although that Act has in effect produced a different result. The construction remains the same, to use the language of the Master of the Rolls, although the legal effect is different. It appears to me that that is the right conclusion, and I must make a declaration accordingly.

Solicitors for Plaintiff: *Bell & Steward.*

Solicitors for Defendant: *Collyer-Bristow, Withers, & Russell,* agents for *Stamp, Jackson, & Birks, Hull.*

Solicitors for other parties: *Slaughter & Colegrave.*

(1) Law Rep. 17 Eq. 288. (2) Law Rep. 19 Eq. 274.

COLLETT *v.* DICKENSON.

FRY, J.
1879
April 5, 9.

[1877 C. 869.]

Married Woman—Separate Estate—Action for Debt contracted as Feme Sole—Trustee not a Party—Form of Order.

An action was brought against a married woman for a debt contracted with a creditor who believed her to be a *feme sole*. She pleaded coverture, and the husband was then made a party. It was alleged that she had separate estate. At the trial it was declared that her separate estate was chargeable with payment of the debt and costs, and an inquiry was directed to ascertain of what her separate estate consisted and in whom it was vested. In answer to the inquiry the Master certified that the separate property consisted of an annuity, secured by the covenant of the husband contained in a separation deed and vested in a trustee. On a summons by the Plaintiff to shew cause why he should not be at liberty to sign judgment, and the trustee not being a party :—

Held, that the Court could only make an order declaring the debt (with interest), and the taxed costs of the Plaintiff, to be a charge upon the annuity, but without prejudice to any claim by the trustee.

THIS action was commenced in the Exchequer Division, on the 27th of June, 1877, by *F. W. Collett* against *Caroline Dickenson*. By his statement of claim the Plaintiff claimed £34 19*s.* 5*d.*, the balance of an account for groceries supplied by him to the Defendant between the 17th of June, 1876, and the 13th of June, 1877. The Plaintiff alleged that the Defendant had made payments from time to time on account. By her statement of defence the Defendant said that she was married in the year 1848, and that her husband was still alive. By his reply the Plaintiff said, 1, that he was not aware, when he gave the Defendant credit, nor until after he had delivered his statement of claim, that the Defendant was a married woman. He believed that she was a widow, and she obtained credit from him by representing herself to be entitled to an annuity; and, 2, that since the delivery of his statement of claim he had discovered that the Defendant was entitled under a separation deed to an annuity settled to her separate use, but he was unable to discover who were the trustees of the separation deed. By her rejoinder the Defendant denied all the allegations contained in the reply, and she said that she was not a widow, but

FRY, J.
1879
COLLETT
v.
DICKENSON.

the wife of *Isaac W. Dickenson* at the time when the Plaintiff gave credit to her as alleged; and the Defendant demurred to the first paragraph of the reply, on the ground, amongst others, that the action was brought upon an alleged contract, and that such an action would not lie against a married woman for falsely representing herself to be a *feme sole* and thereby inducing the Plaintiff to contract with her. On the 17th of January, 1878, an order was made to add the husband as a co-Defendant.

On the 16th of February, 1878, the demurrer was overruled. The action was tried on the 3rd of August, 1878, at the *Warwick* Assizes, before Mr. Justice *Fry* without a jury, when his Lordship, on the authority of *Davies* v. *Jenkins* (1), declared that "all the property now vested in the Defendant *Caroline Dickenson*, or in any other person in trust for her, is chargeable with the payment of the debt and costs in this action." And his Lordship directed an inquiry of what such separate property consisted, and in whom it was then vested. And the further consideration of the action was adjourned, with liberty to any party to apply. On the 18th of December, 1878, the Master made his certificate, finding that the separate property of the Defendant *Caroline Dickenson* consisted of an annuity of £342, secured by the covenant of her husband contained in a deed of separation between her and her husband, and that the annuity was then vested in *Archibald Erskine*, as the sole surviving trustee of the deed. A summons was then taken out in the Exchequer Division calling on the Defendants to shew cause why the Plaintiff should not be at liberty to sign judgment in the action, upon the certificate, for the debt and costs. This was adjourned into Court.

FRY, J., said that he had no jurisdiction to hear the summons without the consent of the parties. It ought to be heard by a Divisional Court.

Both parties then consented that his Lordship should decide the question.

T. Brett, for the Plaintiff:—

I am entitled to judgment on the authority of *Davies* v.

(1) 6 Ch. D. 728.

Jenkins (1); *Picard* v. *Hine* (2). The former case shews that the trustee of the separate estate is not a necessary party to the action.

Woodroffe, for the Defendants:—

The summons in effect asks for a personal judgment; such a judgment cannot be given against a married woman.

[FRY, J:—The summons does not ask for that; a direction to the trustee to pay to the Plaintiff would be sufficient.]

The trustee not being before the Court, no such direction can be given. In *Davies* v. *Jenkins* Vice-Chancellor *Hall* only meant that the trustee was not a necessary party at that stage of the action; but no order that the trustee do pay can be made in his absence.

T. Brett, in reply:—

I ask for leave to sign judgment against the husband and wife.

[FRY, J.:—I do not see how I can give you leave to do that. The husband is made a party merely for the purpose of trying the question whether that which is said to be separate estate is separate estate; he does not represent the separate estate.]

London and Provincial Bank v. *Bogle* (3); *Morris* v. *Freeman* (4).

FRY, J.:—

My difficulty is this: how can I give judgment against the trustee, who is not here? I will ask the Registrar to ascertain what order was afterwards made in *Davies* v. *Jenkins*.

April 9. FRY, J.:—

The Registrar, Mr. *Leach*, has traced the history of the case of *Davies* v. *Jenkins*, but he cannot find that any order was made subsequently to that which is stated in the report. The only order, therefore, which I can now make is to direct the taxation of the Plaintiff's costs of the trial and of this hearing, and declare that the debt claimed by the Plaintiff, with interest thereon at

(1) 6 Ch. D. 728.
(2) Law Rep. 5 Ch. 274.
(3) 7 Ch. D. 773.
(4) 27 W. R. 62.

FRY, J.
1879
COLLETT
v.
DICKENSON.

4 per cent., and the amount of the taxed costs, are a charge upon the annuity payable to the wife under the separation deed. But this order must be without prejudice to any claim of the trustee.

Woodroffe:—The costs of the husband ought to be provided for.

FRY, J.:—The Plaintiff must pay the husband's costs and add them to his own.

Solicitors for Plaintiff: *Church, Sons, & Clarke.*
Solicitors for Defendants: *Joel Emanuel & Co.*

Ex parte EVANS. *In re* WATKINS.

C. J. B.
1879
April 28;
May 5.

Bankruptcy—Secured Creditor—Judgment Creditor—Elegit—Receiver—Delivery of Land in Execution—27 & 28 Vict. c. 112, s. 1—Bankruptcy Act, 1869, s. 16, sub-s. 5.

A judgment creditor became transferee of a mortgage of real estate belonging to the debtor. He then issued a writ in an action in the Chancery Division claiming an account of what was due to him on both mortgage and judgment, with payment, and other relief; and on the same day obtained an *ex parte* order for an interim receiver extending over seven days. At the expiration of the seven days he obtained, on motion upon notice, an order absolute for appointment of the same person to be receiver. On the same day the debtor filed a liquidation petition, and a motion in bankruptcy by the liquidation trustee to stay the action was refused.

The creditor had not sued out an elegit:—

Held, that the appointment of the receiver was such a delivery in execution by lawful authority of the mortgaged lands within sect. 1 of the 27 & 28 Vict. c. 112, as to render the judgment creditor a "secured creditor" within sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869; and that he was entitled to hold the lands comprised in the mortgage deed as a security for his judgment as well as for his mortgage debt.

APPEAL from the County Court at *Aberdare*.

On the 15th of May, 1878, the Respondent, *William Davies*, recovered a judgment in the Queen's Bench Division against the debtor, *Thomas Watkins*, for a sum of £80 2*s.* 1*d.*, and £10 3*s.* 10*d.* costs.

On the 26th of July, 1878, *Davies* became the transferee of a legal mortgage of leaseholds, which mortgage had been effected by *Watkins* in the year 1859, to secure £200 and interest.

On the 7th of August, 1878, *Davies* issued a writ against *Watkins* in the Chancery Division, indorsed with a claim for an account of what was due on the mortgage, and also on the judgment, and payment; or for a sale, and payment out of the proceeds; and for a receiver and injunction; and on the same day a receiver was moved for before the Master of the Rolls, on an affidavit by the Plaintiff, which stated that the Defendant was not, to his knowledge, "entitled to any other lands or hereditaments, or any other property against which any writ of elegit, *fieri facias*, or other process of execution, may be issued for the purpose of obtaining pay-

C. J. B. 1879 *Ex parte* EVANS. *In re* WATKINS.

ment" of the moneys due upon the judgment; also that unless the Defendant were restrained from dealing with the equity of redemption and a receiver were appointed, Plaintiff fully believed that the Defendant would, as soon as he had notice of these proceedings, dispose of his interest in the same, before a decree could be obtained charging the leaseholds with payment of the judgment debt.

Upon this application the Master of the Rolls made an order that *Thomas Whitsun Jones* be appointed interim receiver of the property comprised in the mortgage, without security, until after the 14th of August, 1878; "but such interim receiver is not in the meantime to take possession of the said hereditaments and premises."

Notice was on the same day served on the Defendant to make the appointment of receiver absolute, and on the 14th of August it was ordered that *T. W. Jones*, upon his giving security, be appointed to receive the rents and profits of the hereditaments comprised in the mortgage; and the tenants were ordered to attorn and pay the rents to him.

No statement of claim in the action was delivered.

On the same 14th of August a liquidation petition on behalf of *Thomas Watkins* was filed.

On the 5th of September, 1878, at the instance of the liquidation trustee, an order was made in the County Court restraining the action; but the Plaintiff appealed against the order to the County Court Judge successfully; and an appeal against the last-mentioned order was, on the 18th of November, dismissed by the Chief Judge, with costs.

In February, 1879, the Defendant took out a summons to have the bill dismissed for want of prosecution, but upon this summons no order was made, other than that the summons be adjourned.

By the order now appealed from, dated the 12th of March, 1879, it was declared that *Davies* was entitled to have an account taken of what was due to him on the mortgage; and an account was ordered, with an account of what was due to him on the judgment; and it was declared that he had obtained a charge or lien on the equity of redemption in the leaseholds "in respect of the said judgment and the subsequent proceedings in the said Chan-

cery Division," . . . . or a right "to tack the said judgment debt to his mortgage debt;" with other consequential orders and declarations.

No writ of elegit had been sued out by *Davies*.

Romer, for the Appellant, the trustee:—

The simple question is, has the Respondent *Davies* a right to tack his judgment debt to his mortgage security? I contend that, inasmuch as he never sued out a writ of elegit, or attempted to do so, his judgment debt never became a charge on the land, and hence that he never became entitled to tack.

The only ground upon which the order below was based was the assumption that the appointment of the receiver was tantamount to delivery in possession. In the case of *Anglo-Italian Bank* v. *Davies* (1), where this subject was discussed, the creditor who obtained the receiver had sued out an elegit.

"The origin of the right, which is established by all the authorities, is shewn clearly by *Neate* v. *Duke of Marlborough*" (2); per *Jessel*, M.R. (3); and his Lordship proceeds to point out that the judgment creditor must, in the then state of the law, have sued out an elegit, though his interest was equitable only, if he wished to get a charge on the land. Then came the 27 & 28 Vict. c. 112, which enacted that no judgment should affect any land until such land should have been actually delivered in execution "by virtue of a writ of elegit or other lawful authority;" and this rule has been followed by Vice-Chancellor *Malins* in *Earl of Cork* v. *Russell* (4); and by the Court of Appeal in *Hatton* v. *Haywood* (5); *Anglo-Italian Bank* v. *Davies* (6); *Fisher* on Mortgages (7). That is to say, there must be the issue of a writ, and there must be delivery under the writ, in order to bind the land.

The action in the Chancery Division was good, so far as it sought relief in respect of the mortgage debt, but, for want of the elegit, bad so far as it sought relief in respect of the judgment debt. As a matter of fact the order has not been complied with, for the person appointed receiver has never given security; and it

(1) 9 Ch. D. 275.
(2) 3 My. & Cr. 407.
(3) 9 Ch. D. 284.
(4) Law Rep. 13 Eq. 210.
(5) Ibid. 9 Ch. 229.
(6) 9 Ch. D. 275.
(7) 3rd Ed. p. 662.

C. J. B. 1879 *Ex parte* EVANS. *In re* WATKINS.

was "upon his giving security" that he was to be appointed. So that there was no receiver when the liquidation petition was filed, consequently no delivery in execution within the statute.

Winslow, Q.C., and *Millar*, for the Respondent *Davies*:—

The sole question is, whether the Respondent is a secured creditor within sect. 16, sub-sect. 5? that is to say, whether he has "a charge or lien" on the debtor's estate by virtue of the appointment of the receiver?

Before the 1 & 2 Vict. c. 110, a judgment creditor, if he wanted execution against the land of his debtor, was obliged, as a general rule, to sue out an elegit, which enabled the sheriff to give him possession of one moiety of the debtor's land. That made the judgment in some respects a charge on the land, and no doubt it was held in *Neate* v. *Duke of Marlborough* (1), that though the land could not be extended at law, still the creditor must shew that he had endeavoured to get it. If the land was in mortgage, and the debtor's interest equitable only, then, if the creditor came to the Court of Chancery for relief, he was held bound to shew that he had sued out the writ.

But long before that decision a judgment without an elegit was held sufficient to bind lands, under the *Statute of Merton* 2, or 13 Edw. I. Statute 1, c. 18; even lands purchased after the date of the judgment: *De Moleyn's Case* (2). Then came the decision in *Baker* v. *Harris* (3), in which Sir *W. Grant* held that a mortgagee of a bankrupt was entitled to tack a subsequently docketed judgment debt to his security. There the mortgagee had not sued out an elegit. This was followed, after some doubts had been expressed, by Sir *John Cross*, in *Ex parte Cox* (4).

Then came the 1 & 2 Vict. c. 110, which completely altered the law by making the judgment a charge on the land, and this was followed by the 23 & 24 Vict. c. 38, and by the 27 & 28 Vict. c. 112, which contains the important words that no judgment is to affect any land until such land shall have been actually delivered in execution "by virtue of a writ of elegit, or other lawful authority." So that the question is reduced to this, is the appointment

(1) 3 My. & Cr. 407.
(2) 1 Roll. Abr. 892, pl. 14, 16.
(3) 16 Ves. 397.
(4) 2 M. D. & D. 486.

of a receiver of the rents and profits of land at the suit of this creditor, a delivery in execution by a lawful authority? In *Hatton* v. *Haywood* (1) no doubt the creditor had sued out an elegit, but Lord *Selborne*, C., in commenting on these words, says (2), "Any lawful authority which could cause such a delivery as the subject-matter was capable of, seems to me to satisfy the language of the statute; and in any case in which the judgment creditor must have come into equity to remove a legal impediment, the judgment and execution issued being the foundation of his right, it appears to me the relief given is substantially a delivery in execution, whether in form it be a writ of assistance, or of sequestration, or the appointment of a receiver." The appointment of a receiver involves the delivery of the rents to the receiver, and it cannot be said that the order of the Master of the Rolls was made *per incuriam*, for it was made upon grounds which were sufficiently stated in the affidavit. By that order the Court of Bankruptcy has already held itself bound.

We do not dispute the decision in *Neate* v. *Duke of Marlborough* (3), but the reasoning of that case may be open to review, now that all Divisions are made branches of one Court: sect. 25, sub-sect. 8 of the *Judicature Act*, 1873. The effect of the statute is to do away with the useless ceremony of suing out an elegit when the lands are not extendible.

The fact that, supposing no mortgage, and that a creditor had obtained a receiver, no elegit creditor even could attach the lands without settling with the Court, shews that the appointment of receiver must be tantamount to delivery in execution.

In the *Earl of Cork* v. *Russell* (4) the judgment creditors who, not having issued execution, were held to be unnecessary parties, were not mortgagees at all; and that distinguishes the case. It was in his character of mortgagee that the Respondent obtained the receiver; not of judgment creditor.

Entry into possession of lands by sequestration is a delivery of lands in execution by virtue of "lawful authority," within the meaning of the statute: *In re Rush* (5).

(1) Law Rep. 9 Ch. 229.
(2) Ibid. 235.
(3) 3 My. & Cr. 407.
(4) Law Rep. 13 Eq. 210.
(5) Law Rep. 10 Eq. 442.

C. J. B.
1879
Ex parte EVANS.
In re WATKINS.

Romer, in reply:—

Baker v. *Harris* (1) and *Ex parte Cox* (2) are authorities for the proposition that a judgment obtained by a creditor having an antecedent mortgage gave him such an interest in the land as enabled him to tack his debt. But in this case the judgment was obtained first, and the transfer of the mortgage afterwards; and those cases do not apply.

On the other hand, there is the old authority of *Neate* v. *Duke of Marlborough* (3); there is the decision in *Earl of Cork* v. *Russell* (4) that a delivery in execution under an elegit is as necessary since the Act of the 27 & 28 Vict. 112, as it was before; and in *In re Cowbridge Railway Company* (5), where Vice-Chancellor *Wood* held that "actually delivered in execution" must mean where the writ had been executed by the sheriff as far as it was capable of being executed, his Lordship expressly stated (6) that the practice of the Court of Chancery was not to relieve a judgment creditor until he had done all he could at law. In this judgment *Smith* v. *Hurst* (7) was referred to, which supports the same doctrine as stated by Lord *Redesdale* in his Treatise on Pleading; so also *Wallis* v. *Morris* (8) and *Godfrey* v. *Tucker* (9).

The same statute, 27 & 28 Vict. c. 112, which provides that no judgment shall affect land, "until such land shall have been actually delivered in execution," also provides, sect. 3, that "every writ or other process of execution of any such judgment by virtue whereof any land shall have been actually delivered in execution shall be registered." Why? In order to give notice to a purchaser; and to make such notice generally effective, it was necessary to have first a writ, and then registration of the writ. Otherwise equitable execution might be granted to a creditor without the knowledge of the debtor.

It may be questioned whether even under the Judicature Acts a legal mortgagee is entitled to a receiver; but at any rate the appointment of the receiver in this instance must be attributed

(1) 16 Ves. 397.
(2) 2 M. D. & D. 486.
(3) 3 My. & Cr. 407.
(4) Law Rep. 13 Eq. 210.
(5) Law Rep. 5 Eq. 413.
(6) Ibid. 416, 417.
(7) 10 Hare, 30.
(8) 12 W. R. 997.
(9) 33 Beav. 280.

wholly to the Respondent's title as mortgagee, not to his title as judgment creditor. Even the appointment of the receiver was such an appointment as did not amount to an equitable execution. The essence of execution is the actual receipt of the rents and profits.

Winslow, in reply, on the cases cited in reply.

BACON, C.J.:—

The case, no doubt, is a very nice one, and I need not say has been very ably argued by Mr. *Romer;* but I feel myself under the necessity, not of disregarding his argument, to which I have listened with interest and attention, but of deciding the case on a point which is not affected by the whole course of that argument.

The law of elegit, which is well known and of considerable antiquity, has undergone a variety of modifications by statute, and is greatly affected by the decisions to which Mr. *Romer* referred. The policy of the later statutes is plain enough; it is, that subsequent purchasers, or subsequent incumbrancers, shall not be affected by the fact of a judgment creditor having issued an elegit unless such judgment be registered. That is the sole policy and scope of the Acts of Parliament. They do not profess to touch the rights of the parties *inter se.* There is no word in the statutes, or any one of them, from which any such conclusion can be drawn. What have I to deal with here? A suit was instituted by writ in the Chancery Division. Then, on an application made to the Court, the Court exercising the powers which the *Judicature Act* has conferred upon it, is told this: "The Defendant is not entitled to any other lands or hereditaments, or any other property against which any writ of elegit, *fieri facias*, or other process of execution, may be issued for the purpose of obtaining a payment of the money due and owing to me under my aforesaid judgment." On that representation the Court acts, and the Court appoints a receiver. After the two cases which have been mentioned, namely, *Hatton* v. *Haywood* (1) and *Anglo-Italian Bank* v. *Davies* (2), there can be no doubt what "delivery in execution"

(1) Law Rep. 9 Ch. 229. (2) 9 Ch. D. 275.

C. J. B. 1879 *Ex parte* EVANS. *In re* WATKINS.

means. The Lords Justices have very carefully defined the meaning of it. It is true that in those cases an elegit had been issued, but the Lords Justices have decided on these words of the statute (27 & 28 Vict. c. 112, s. 1) "lawful authority other than a writ of elegit," that "delivery in execution" by the lawful authority other than by virtue of a writ of elegit means equitable execution. In this case the Court has decided on the facts proved by the affidavit I have read, that it is right there should be a delivery of execution of the lands in question, at least for over seven days. At the expiration of the seven days, or on the seventh day, the Court makes another order, appointing a receiver without qualification as to limit of time, and appointing him in the common form of the Court on his giving security. The failure to give security does not invalidate the appointment of the receiver. The proviso that security is to be given cannot affect the order that there shall be a receiver, for if the receiver fails to perfect his security, the Court will order some other person to be receiver who can perfect his security. But the order for a receiver, that is to say, that order by which the Court takes the subject of the suit into the custody of the law, precludes any other person from laying hands on it; and begins and is operative from the time when the order is made.

Now in this case, unless I have misunderstood what counsel have told me, there was an attempt made by the trustee in bankruptcy to stay the proceedings in Chancery. He did not succeed; but the cause is still in the Chancery Division, and there is a valid, subsisting order of the Chancery Division, taking into custody the possession of the subject of the suit, by appointing a receiver to receive the rents and profits. I do not forget that the first order restrained him from taking, or did not permit him to take, possession of the land itself, but only to receive the rents and profits.

It is said this is not delivery in execution. Unless I am prepared to overrule the two cases which have been mentioned in which the meaning of those words of the statute is expressed and defined beyond the possibility of doubt, I cannot entertain Mr. *Romer's* argument in that respect. I do not think there is enough to enable me to do so. Supposing the second order for a receiver

is invalid, or is inoperative, it is an order from the time it was pronounced, and an order operative to this extent, that, whosoever had a right to possession up to that time, the Court had then taken possession, and the Court had pointed out the person to whom execution should be delivered. I cannot overrule the Master of the Rolls' order; and I was of opinion when the application for the stay of the proceedings came before me, that I could not restrain the proceedings.

Now in what situation is the trustee in bankruptcy? Surely he is in a no better situation than the debtor would have been, if he had not been a bankrupt, and if he, being bankrupt, is a defendant to a suit in the Chancery Division in which there has been delivery in execution on the ground of the undisputed facts mentioned in the paragraph of the affidavit which I have read, can I by possibility say that the trustee in bankruptcy, notwithstanding the statute which requires registration of the judgment, and registration of the elegit where that may become necessary, although in this case it did not become necessary, can frustrate the rights of the Plaintiff, and set aside the order? It seems to me impossible that I can. If any person hereafter were to lay hands on any part of the property while the Master of the Rolls' order remains he would be guilty of a contempt of Court. The property is in the custody of the law. In my opinion it has been effectually delivered. I do not dispute the force of the reasoning which Mr. *Romer* has addressed to me, that, under the law beginning with *Neate* v. *Duke of Marlborough* (1), there might have been an objection taken to the Plaintiff's application in the action. No such objection having been taken, and the Court having, on the facts I have read from the paragraph in the affidavit, thought fit to exercise its unquestionable power under the *Judicature Act* to appoint a receiver in any case, I cannot interfere with that order, and I cannot say that the order of the Court appealed from, in which full respect has been paid to that order, and the rights created by it understood, ought to be disturbed.

In my opinion on the title as it stands at present, though I admit the case is extremely nice and difficult—in one sense very novel—I cannot interfere with the order which has been made;

(1) 3 My. & Cr. 407.

C. J. B. 1879 *Ex parte* EVANS. *In re* WATKINS.

nor can I say that the Appellant has made out such a case before me as that I can discharge the order which has been made by the Judge of the County Court.

The appeal must be dismissed with costs.

Solicitors: *Hacon & Turner*, agents for *Beddoe, Aberdare; Bell, Brodrick, & Gray*, agents for *H. P. Linton, Aberdare.*

In re GOLD COMPANY.

C. A.
1878
V.-C. M.
March 29;
April 5.
C. A.
Dec. 20.
1879
Jan. 14, 18, 20.

Company—Winding-up—Petition by Shareholder for Compulsory Winding-up after Resolution for Voluntary Winding-up—Companies Act, 1862, *s.* 145 *—Division of unallotted Shares among Shareholders without Consideration —Reduction of Capital—Companies Act*, 1867, *ss.* 9, 25.

After a resolution has been passed for winding up a company voluntarily a shareholder cannot, as a general rule, obtain a compulsory order for winding up, or an order for continuing the voluntary winding-up under supervision. The only exceptions to the rule are where the resolution has been passed fraudulently, or where creditors appear to support the petition.

By the articles of association of a limited company the directors were authorized, when it should appear to them that the capital for the time being subscribed was sufficient for the purposes of the company, to allot the remaining unallotted shares among the shareholders in proportion to the number of shares then held by them, without receiving any money for them.

When shares to the amount of one-fourth of the nominal capital had been allotted and paid up, the directors allotted the remaining three-fourths, as fully paid up shares, among the existing shareholders without further consideration; and the Petitioner became a purchaser of some of these shares in the market. The company passed a resolution for a voluntary winding-up, and afterwards the Petitioner presented a petition for a compulsory winding-up:—

Held, that the provision in the articles was highly improper; but that if it amounted to a fraud it was a fraud upon the Petitioner in his individual capacity of purchaser of the shares, and was not committed by or upon the company, and, therefore, it was not within the scope of the Winding-up Acts to give relief in respect thereof. The petition for winding up was accordingly dismissed.

The decision of *Malins*, V.C., reversed.

THE *Gold Company, Limited*, was incorporated in November, 1873, for working gold mines in *Wales*, with a nominal capital of £100,000, divided into 100,000 shares of £1 each.

The 7th clause of the articles of association provided for the increase of the capital of the company by the issue of new shares.

The 11th clause was as follows: "The directors may allot and issue shares in the present capital, other than the shares mentioned in clause 7 hereof, to such persons, upon such terms, and at such times as they may think fit. If at any time it shall appear to the directors that the capital of the company for the time being subscribed will be sufficient for the purposes of the company, they

C. A. 1879 *In re* GOLD COMPANY.

may allot any shares which then remain unallotted to and among the then shareholders in proportion to the number of shares respectively held by them, and such shares may be allotted as fully or partially paid-up shares, although no money may be received in respect of such shares from any allottee thereof."

By a contract in writing dated the 31st of December, 1873, and made between the company of the first part, certain persons named in the 1st schedule of the second part, and all the persons who were then shareholders of the company of the third part, it was agreed that certain shares should be allotted as fully paid-up shares to the parties of the second part in consideration of moneys stated to have been advanced by them for the benefit of the company.

This contract was duly registered on the 8th of January, 1874.

At the date of the contract only 2375 shares had been allotted, and under the provisions of the contract 22,625 more were allotted, making together 25,000 shares.

On the 12th of January, 1874, the directors passed a resolution to the effect that in their opinion sufficient capital had been subscribed for the purposes of the company, and they proceeded to allot the whole of the remaining 75,000 shares as fully paid-up shares, in pursuance of the 11th clause of the articles of association, to the then existing shareholders of the company in proportion to the number of shares held by them. This allotment was also registered.

Many of these gratuitous shares were sold in the market, and Mr. *Carter*, the present Petitioner, bought 100 of them in March, 1875, at which time they were at a small premium.

The *Stock Exchange* having refused the company a settling day, and the mine having proved a failure, a resolution was passed on the 9th of May, 1877, to wind up the company voluntarily, and the secretary of the company was appointed liquidator. The meeting was duly advertised, but was attended by seventeen shareholders only out of 384. Of these seventeen, eleven voted for the winding-up, two against it, and four did not vote at all. No poll was demanded, and the chairman accordingly declared the resolution carried.

On the 23rd of February, 1878, Mr. *Carter* presented the

present petition for the compulsory winding-up of the company, which came on to be heard before Vice-Chancellor *Malins* on the 29th of March, 1878.

Higgins, Q.C., and *Oswald*, appeared for the Petitioner.

Glasse, Q.C., and *Buckley*, for shareholders in support of the petition.

J. Pearson, Q.C., and *J. Wilkinson*, for the company.

Bristowe, Q.C., and *Deane*, for the principal part of the creditors and some of the shareholders.

MALINS, V.C.:—

The transactions of this company have been of a most extraordinary and unusual character. The articles and memorandum of association contain a power in the 11th clause which I have never seen before, and which certainly ought not to be found in any articles of association. I do not express any opinion whether this clause was inserted with a fraudulent intent, but it certainly is a clause which may very well be turned to fraudulent purposes. The course taken was this: According to the statements of the directors 18,775 shares only were taken up. The company was formed in November, and six weeks afterwards, when it was impossible for any one to form an opinion as to what capital would be necessary to work the mine, the directors hold a meeting, and they allot to every man who held shares three shares for every share so held, so that, for instance, Mr. *Aspinall*, who held 500, received 1500 more shares. Mr. *Attenborough*, the chairman of the company, who held 575 shares, received an allotment of 1725 shares, and so on, all receiving three free shares for every share held. What could have been the object of this transaction? Is it possible to believe that it was intended to be a straightforward and honourable dealing? How did it work? Every one of these men who had received the allotment was at liberty to go into the market and sell his shares. They even tried to get a settling-day on the *Stock Exchange*, but the committee of the *Stock Exchange* discovered the state of affairs and refused the application. How-

C. A. 1879 *In re* GOLD COMPANY. V.-C. M.

ever, the shares were extensively sold, and Mr. *Carter*, the Petitioner, in consequence of the representations made as to the flourishing condition of this company, was induced, in the year 1875, to purchase from Mr. *Edward Vickers*, one of the gentlemen who signed the memorandum of association, 100 of these worthless shares of £1 each, at a premium of 9*d.*, so that he gave £1 0*s.* 9*d.* for what was not worth a farthing. At this time the directors and others who sold the shares, and every one connected with the company must have been perfectly convinced that the thing was an utter failure, and that the company ought at that time to have been wound up. Then, in 1875, it appears by the banking account that the company was in a state of utter exhaustion. The balance against them was £122. In the succeeding year their total receipts were £124, and the balance against them £4 12*s.* 4*d.* In the year 1877 they commenced with a balance in hand of £35, and afterwards received £30 more, which was all paid away before the 9th of May, when a resolution was passed for a voluntary winding-up. The meeting for that purpose was composed of seventeen persons, of whom eleven voted in support of the resolution, two voted against it, and four declined to vote at all: still they had the requisite majority of three-fourths, because I must consider those who declined to vote as not being present, but the majority, as I collect, were persons who had been engaged in the original transaction, and who had adopted this most improper course of allotting to themselves three free shares for every one share. What, then, was their object in this transaction? It must have been to screen themselves, and to blind the public, so far as the public had had dealings with them, and they appoint their own secretary, who has been their servant from the beginning, who had aided and abetted them in all these transactions; they appoint him liquidator, and no wonder, therefore, they are desirous that the management of the liquidation should remain in his hands, for he will certainly take no step likely to be disagreeable to the directors, nor do anything for the benefit of the creditors.

One of the most extraordinary things in this case is that I have actually had counsel appearing for creditors opposing the petition, which, if acceded to, may give them something and can cost them

nothing, since the creditors are not liable for the expenses of winding up.

The only conclusion I can come to upon this case is, that the directors who have been guilty of these practices are very desirous of keeping the winding-up in the hands of their friend the secretary, and thus to escape all investigation of the transactions which appear to me eminently to call for investigation, and of this I am quite certain, that the present liquidator will never make a proper investigation.

On the other hand, if I appoint a liquidator, he will look into all the transactions, and will see whether all the money stated to have been paid by these persons for their shares has in fact been paid, or whether they are not liable to pay something more for the shares they admit they had, even if the issue of the extra shares is valid.

The petition has been opposed on various grounds, amongst others, that I have no authority to make a compulsory order to wind up after a voluntary winding-up. I confess I am much inclined to look at that meeting which resolved upon the winding-up as a delusive meeting having no good faith in it, held, as it appears to me at present, mainly for the purpose of screening the directors, smothering the transactions of the company, and keeping them from investigation. But, however, it has been argued by Mr. *Deane* that I cannot do this in the face of the 145th section, which is in these words: "The voluntary winding-up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by voluntary winding-up." It was very fairly urged that if a voluntary winding-up of a company shall not be a bar to the right of any "creditor" of such company, that means that it is a bar to the right of any person other than a creditor, and therefore that it is a bar to the right of a shareholder. But Mr. *Higgins* has drawn my attention to the authorities collected upon that section in Mr. *Buckley's* book (1), from which it appears, and particularly by *In re Littlehampton, &c., Steam Company* (2), that it has not been the practice of the Court to consider that as an absolute bar, but to

(1) Page 278. (2) 2 D. J. & S. 521.

C. A. 1879 *In re* GOLD COMPANY. V.-C. M.

look at all the surrounding circumstances, and if it sees that the resolution to wind up voluntarily has been obtained under such circumstances as to require further investigation, the Court will make a compulsory order.

Then another point was that it was unnecessary to make such an order, because the remedy may be obtained under the 138th section, and that whatever they could get under a compulsory winding-up could be obtained under that section, which is, that "Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court to determine any question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court; and the Court, if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede wholly or partially to such application on such terms," and so forth. I am satisfied that practically it will be impossible to have a proper investigation under any application on that section, and it will be utterly impossible, in my opinion, that any proper investigation of the transactions of this company can take place while the friendly liquidator remains in office, the servant of the men who have been guilty of these practices of which so much complaint has been made.

This case illustrates very forcibly the rule which I have, on the suggestion of my Chief Clerks, founded on their experience, directed them to adopt, in no case whatever to appoint any official of the company liquidator. They are always under some improper influences, and you cannot get as fair an investigation in an impartial and proper manner from a secretary or even a co-director, as from a person who would be indifferent in the matter. Therefore, my great object in making the compulsory order which I intend to make in this case, is that I may have an impartial and indifferent liquidator, and I shall take care to select some man fully competent to do it, to investigate the affairs of this company, and to see whether the moneys which are alleged to have been paid by these directors have been paid; and to bring before the Court in the proper manner the question of the liability on these

C. A. 1879 *In re* GOLD COMPANY. V.-C. M.

transactions, which are, in my opinion, of the most blameable character. Whether they have incurred a liability or not, they are proceedings which no Court can approve.

They are, in my opinion, so improper from the beginning to the end, that, if they were not fraudulent, they were calculated to be the means of fraud, and I am perfectly clear that they have been the means of fraud, when I find that they were the means of selling these shares at a premium at a time when everybody perfectly well knew that the company was in the last stage of decay and ruin.

On all these grounds, therefore, I make the usual order to wind up compulsorily, with the usual order as to costs.

C. A.

From this order the company appealed. The appeal came on to be heard on the 20th of December, 1878.

J. Pearson, Q.C., and *J. Wilkinson*, for the Appellants, and

Bristowe, Q.C., and *Deane*, for the creditors and shareholders:—

Our first objection to the petition is that the Petitioner is a paid-up shareholder, and therefore cannot have any further liability. He has therefore no *locus standi* to obtain a winding-up order.

[THE COURT having intimated an opinion that this objection could not be sustained, they continued their argument.]

Another objection is, that a contributory who is not a creditor cannot obtain a compulsory winding-up order after a resolution for voluntary winding-up. The 145th section of the *Companies Act*, 1862, gives that power only to creditors: *In re Bank of Gibraltar and Malta* (1). It is only under very exceptional circumstances that the Court will interfere, on the application of a contributory, with a voluntary winding-up; for instance, where there has been fraud in obtaining the resolution, or where it is supported by the creditors, which is not the case here: *In re Beaujolais Wine Company* (2); *In re Imperial Bank of China* (3); *In re London and Mercantile Discount Company* (4); *In re London*

(1) Law Rep. 1 Ch. 69.
(2) Ibid. 3 Ch. 15.
(3) Law Rep. 1 Ch. 339.
(4) Ibid. 1 Eq. 277.

C. A. 1879 In re GOLD COMPANY.

Flour Company (1). An attempt has been made to shew that the resolution to wind up was not duly passed; but the chairman certified the majority, and if it was disputed it ought to have been challenged at the time.

With respect to the merits of the case, there has been nothing fraudulent in the allotment of shares. Every one who purchased shares or dealt with the company had notice of the 11th clause of the articles, and of the contract of the 31st of December, 1873, which was duly registered. Nothing that was done altered the relations of the shareholders *inter se*.

Higgins, Q.C., and *Oswald*, for the Petitioner:—

There are no negative words in the 145th section of the *Companies Act*, 1862, to prevent a contributory from obtaining a winding-up order after a resolution to wind up voluntarily; and the cases of *In re Littlehampton, &c., Steam Company* (2), *In re West Surrey Tanning Company* (3), *In re Imperial Bank of China* (4), *In re Fire Annihilator Company* (5), and the cases referred to by the Appellants, shew that a resolution to wind up is not an insuperable bar to a compulsory order, but that the Court has power to make such an order if the justice of the case requires it.

But should the Court be of opinion that we have no *locus standi* to obtain a winding-up order, we are, at all events, entitled to an order to continue the winding-up under supervision. This is peculiarly a case in which the fullest investigation is necessary, which can never be obtained unless the winding-up is carried on under the control of the Court. The insertion of the 11th clause of the articles was itself fraudulent; it was a contrivance to evade the *Companies Act*, 1867, by issuing three-fourths of the shares of the company without consideration. Moreover, it was a device for reducing the capital of the company without complying with the provisions of the Companies Acts. It was also a fraud upon the purchasers of shares; for the effect of the transaction was that none of the allottees paid more than one-fourth of the value of their shares; in other words, they threw upon the

(1) 16 W. R. 474, 552.
(2) 2 D. J. & S. 521.
(3) Law Rep. 2 Eq. 737.
(4) Ibid. 1 Ch. 339.
(5) 32 Beav. 561.

market, as fully paid-up £1 shares, shares on which in fact only 5*s.* had been paid. The registration of the contract under the 25th section of the Act of 1867 could not make a bad contract good. The whole transaction is tainted with fraud, and is one which the Court will not support: *Society of Practical Knowledge* v. *Abbot* (1); *New Sombrero Phosphate Company* v. *Erlanger* (2).

In default of all other relief, we ask for permission to use the name of the liquidator in taking proceedings againt the directors.

Buckley, for other shareholders, one of whom he stated to be also a creditor.

JAMES, L.J.:—

The first question raised on this appeal is a very important general question, far beyond the issue involved in the case before us, that is, whether the Petitioner, being a shareholder, has a right to a compulsory order for winding up after a resolution for a voluntary winding-up has been passed by the company. If the matter were what we call *res integra*, I myself should have come to the conclusion, upon the construction of the Act of Parliament, that the voluntary winding-up is a bar, or, to use Mr. *Higgins*' expression, an insuperable bar, to the making of a compulsory order for winding up. There is a clause in the Act which provides that a voluntary winding-up shall be no bar to an application by a creditor for a compulsory winding-up, and *expressio unius* generally speaking *est exclusio alterius*. Beyond that, the Act appears to contain a great number of provisions intended, and it seems to me calculated, to prevent any mischief which might otherwise arise from any wrong done to a shareholder by the voluntary winding-up. There have been several cases in the Courts in which, notwithstanding that language in the Act, a contributory has obtained an order for winding up after the commencement of a voluntary winding-up. The leading case, in my view of the subject, and the one which seems to me to establish the principle, is *In re West Surrey Tanning Company* (3), where the Court, in fact, came to the conclusion that the voluntary winding-

(1) 2 Beav. 559. (2) 5 Ch. D. 73; S. C. 3 App. Cas. 1218.
(3) Law Rep. 2 Eq. 737.

C. A. 1879 *In re* GOLD COMPANY. James, L.J.

up, or the resolution to wind up voluntarily, was, under the circumstances, a sham. There was one man whose conduct was impeached, whose dealings and transactions with the company required investigation, and he himself had a complete majority of votes, so that he could by his own votes have determined that no proceedings should be taken against himself, and that there should be no investigation into his dealings. I can conceive a case in which that might apply to the majority of the shareholders—that is to say, where the majority of the existing shareholders were so mixed up with the matters complained of and the matters requiring investigation, that the resolution of a general meeting would be a decision by an interested judge, if I may use the expression, by persons incompetent to decide by reason of their personal interest in the matter. I am of opinion that, to enable the Court to make such an order as the Vice-Chancellor has made, the case must, at all events, be brought up to a case of that kind —that is to say, to a case in which, from the circumstances which have occurred, the Court sees that the shareholders cannot be trusted to determine the matter for themselves. But I cannot find anything like that made out or even alleged in the present case; because, although all the shareholders at one time were parties to the transactions complained of, which I shall consider afterwards, the case of the Petitioner is that there were dealings in the shares on the *Stock Exchange*, and there were transfers of shares, the result of which was that there are now several hundreds of shareholders, over 300, holding 40,000 or 50,000 shares in the company, every one of whom is in the same interest with the Petitioner, and acquired his shares in the same manner, and has exactly the same ground of complaint as he has. I cannot find anything in this case to satisfy the Court, or to entitle the Court to say that it can deprive those shareholders, for they are persons interested, of the right which belongs ordinarily, and except under very exceptional circumstances, to the shareholders of every joint stock company or corporation of this kind, of determining amongst themselves, for themselves, by a majority, according to their view of what is most for their interest, what ought to be done or ought not to be done, either in the disposal of the property of the company, or in making any claims against

any supposed debtors to or persons liable to the company. I am of opinion, therefore, that in this case there was no ground for a compulsory order to wind up.

That, however, does not dispose of the case, because it was suggested, and I think properly suggested, by Mr. *Higgins*, that although we could not grant, for those reasons, the order for a compulsory winding-up, there might be, and ought to be, some other less order. The Petitioner asks, no doubt, for a compulsory winding-up, but he says he is entitled at all events to have what is called a supervision order, that is to say, an order for placing the matter under the supervision of the Court, which would enable the Court to do justice as between the different classes of shareholders, or some other order that he may use the name of the company in instituting proceedings to obtain relief. Therefore it is necessary to consider whether the Petitioner is in this case entitled to any relief.

Now, for the purpose of this petition it seems to me that the material facts are few and undisputed. The deed of settlement certainly contains a most extraordinary provision, a provision which the Vice-Chancellor has denounced in very strong terms, and I am not prepared to differ from him with respect to it. But still it was one of the terms of the constitution of the company, and the Petitioner became a shareholder in a company of which that was one of the terms and conditions. First of all it was intended to issue 25,000 shares, and that clause was one enabling the directors, if they thought fit, if they came to the conclusion that they did not want any more money, to issue 75,000 amongst the holders of the 25,000 shares. However, there is that provision, and it was carried into effect by an instrument duly registered within the provisions of the Act, so as not to be obnoxious to the special provision, which requires that all shares shall be issued for money, and not otherwise, unless by an agreement duly registered. By that instrument, all the persons then interested in the company being parties to it, a large number of shares were allotted for that which all the then shareholders considered to be a sufficient consideration, partly for money, partly for services rendered, partly for debts or sums said to have been advanced to the company. At all events 25,000 shares were allotted to the then

C. A. 1879 *In re* GOLD COMPANY. James, L.J.

shareholders, and immediately after the execution of the contract the directors, in pursuance of the clause I have mentioned, allotted the remaining 75,000 shares between the holders of the 25,000 shares, that being done with the assent of the holders of the 25,000 shares who accepted the allotment. The fact of that allotment, and the circumstances under which it was made, were also registered so as to escape the provisions of the *Companies Act*. Whether it complied with the spirit of the Act it is not for me to say. However, that was done.

What was the legal result of what was so done? All the persons interested in the company by this transaction in effect divided the property between themselves, in fractions of which the common denominator was 100,000. Of course where the shares are all paid up and nothing remains to be called, all the company has got is its property. Therefore, as I said, they divided the whole property between themselves, in fractions of which the denominator was 100,000. One can see a motive for it, of course, which I shall afterwards mention. Now upon whom was that a fraud, or to whom was it a wrong? It could not be a fraud upon, or a wrong to the existing shareholders, because every one of them was a party to the transaction. It could not be a fraud upon or a wrong to future shareholders—I mean in the sense of the allottees of shares—because the very essence of the transaction was that no more shares were to be or could be issued thereafter. It was no fraud upon or wrong to the existing creditors, if existing creditors there were, because it appears that if there were any existing creditors, they either were satisfied, or paid, or have acquiesced in what has been done, and *volenti non fit injuria*. It was no legal wrong to any future creditors, because by the transaction the most distinct notice was given to any person not a shareholder that he had no uncalled capital to look to, that there were no shares remaining to be issued, that there was to be no money derived either by the issue of shares, or by calls on existing shareholders, and if anybody chose to give credit under the circumstances to such a company, he was giving credit to the property of the company, whatever it was, just in the same way as a person gives credit to the *Bank of England* when he takes a £5 note, or to any other corporation which has all its capital paid up.

Then what is the fraud upon or wrong to persons like the Petitioner who bought shares in the market? The Petitioner got exactly what was offered to him. He got for the £100 which he gave the thousandth part of the mine as it stood. He derived his title in fact from and through the very transactions which are complained of, the shares being paid-up shares, most of which were obtained in that way. He obtained the shares from a person who was a party to the transaction which I have described, and he obtained them with full notice in point of law that every other shareholder in the company was in exactly the same position as himself, that is to say, that no shareholder was to pay anything, and that there were no shares to be issued, and therefore in that sense there was no wrong done to him. And in truth when his case, as alleged and proved by him, comes to be looked at, it is a case, as it seems to me, wholly outside the provisions for winding up companies. His case is, that by this mode of creating shares, by this mode of dealing with the shares, and by subsequent devices and practices—I will not say on the *Stock Exchange*, because the *Stock Exchange* refused to allow a settling-day—but by devices and practices in the stock market he was deluded into giving £100 for that which was not worth 100 farthings. The Vice-Chancellor used strong language, but I cannot help thinking that he did not use too strong language in describing what was done as against some of the persons connected with it. I cannot help thinking that it was intended by some persons or other connected with this transaction to call the capital £100,000 with a view of giving it a false reputation in the market, and inducing persons to think they were getting something of value when they were getting in fact that which was utterly valueless. But, then, that is a wrong done to each individual purchaser. Anybody who has been deluded, as this Petitioner says he has been, into giving money for that which was an utter sham, or nearly so, has a ground of complaint to himself individually; it is a wrong done to him personally; it was not a wrong done by the company or to the company. It was not a wrong done by persons in a fiduciary character towards the company for whom they were trustees, but a wrong done by the individual, whoever he was, who deluded him into making the purchase, and by those persons who enabled that

C. A. 1879 *In re* GOLD COMPANY. James, L.J.

fraud to be practised, who assisted in perpetrating the fraud upon him, and against whom, therefore, he may have the relief which the law entitles him to have. But, as I repeat, that has nothing at all to do with winding up the company, either compulsorily or otherwise. It is not the function of a winding-up order to give remedies for wrongs connected with the dealing in shares, to give relief or redress to the man to whom the wrong is done by his being induced to become a shareholder, a wrong not done to him in his character of shareholder, not done to anybody whose shares he takes, but done to him in his character of a purchaser of shares in the market. Now that wrong is one for which, as I have said, he may have redress. There may be circumstances which might possibly have induced the public authorities to intervene in the matter, but it is not, according to my view, within the function of the *Winding-up Act*, nor within the province of this Court to give relief under this Act for the purpose of enabling such a complainant to get redress, or for the purpose of enabling him to investigate the books and documents or transactions of the company by way of discovery to assist him in making out his case against the persons against whom he has a case. In my opinion, therefore, this Court cannot give him any relief whatever upon those principles.

I say nothing about the neglect, the length of time which elapsed before the Petitioner presented his petition, though that would of itself have been a very important matter for consideration. I do not wish to weaken what I have said on the general principle by laying any stress upon the delay, but it would have been, I think, a very serious impediment in the way of his obtaining any relief on this petition that he allowed the voluntary winding-up to go on for nearly a year with full notice of what had been done, and allowed it to be completed before he took the proceedings which he has done. I therefore say that in my opinion the petition has failed, and that the order of the Vice-Chancellor ought to be discharged with costs.

Although all the persons are not before us, I do not feel any hesitation in concurring with the Vice-Chancellor in the hope that such a clause as the 11th clause, to which I have referred, will never again be inserted in articles of association, and that no such

transaction will again be resorted to, because if there was not actual fraud proved—and I do not like to say there was actual fraud in anybody connected with this transaction—if there was not actual fraud proved, the transaction was such as the Vice-Chancellor truly says was very likely to lead to fraud. I agree with the Vice-Chancellor in expressing my strong disapprobation of such machinery having been resorted to, which, at all events, might have been the means, and not improbably was the means, of fraud on those unwary persons who might have been induced to buy in the market such things as they did buy in this case for large sums of money.

BAGGALLAY, L.J.:—

The Petitioner in this case is the holder of 100 shares, all fully paid up, in the company which he now seeks to have wound up under the order of the Court. There are one or two circumstances in the case which are not at all in dispute which I will first allude to, because I think they have a material bearing on the ultimate disposal of the case. This company was incorporated in November, 1873. In June, 1875, the present Petitioner acquired his shares by purchase, having bought them in March, and completed the purchase in June, 1875. The resolution for a voluntary winding-up was passed in May, 1877; and it was not till some time in the year 1878 that he presented this petition. Now, whether he had or had not an opportunity of seeing the earlier balance-sheets which were published by the company, he must, at any rate, have had full opportunity of seeing that which was made in 1876, and was published and issued prior to the time when the voluntary winding-up was resolved upon. He now comes before the Court alleging irregularities in the formation of the company, irregularities in the conduct of the business by the directors, and irregularities as far as regards the obtaining of the resolution for the voluntary winding-up. He says that with regard to these allegations he has not sufficient protection under the provisions of the 138th section of the *Companies Act*, 1862, and he asks relief by the terms of his petition in the form of a compulsory order for winding up; but at the bar it has been urged upon us that he may be entitled either to a compulsory order, or, if not to a compulsory order, to a continuation of the voluntary winding-up under

C. A. 1879 *In re* GOLD COMPANY. Baggallay, L J.

supervision, and, if to neither of those two, that he is entitled to that which was granted in the case of the *Imperial Bank of China* (1) by the Lords Justices, namely, leave to use the name of the voluntary liquidator, indemnifying him, for the purpose of prosecuting such proceedings as he may be advised against the directors.

Now the petition was opposed on three grounds—first, that he is a paid-up shareholder, all the shares he holds having been paid up in full; secondly, that being a contributory he was not at liberty to present a petition for an order for compulsory winding-up, or for a continuation of the winding-up under supervision; and thirdly, on the general merits of the case. The first ground of opposition, that he was the holder of fully paid-up shares, was taken as a preliminary objection, and was then disposed of. Though, no doubt, a shareholder who has paid up in full may, under certain circumstances, present a petition, and obtain a winding-up order from the Court, there must be very special circumstances shewn for that purpose, as, for instance, that by the course which is suggested there may possibly be something to be returned to the shareholder, or to him and to other shareholders. As regards the second ground of objection, namely, that the Petitioner being a contributory, and there being a voluntary winding-up, that voluntary winding-up is a bar to his presenting a petition for a compulsory winding-up, I entirely agree with what the Lord Justice has just now said, and if the matter were *res integra*, I should be very much disposed to hold that it was a bar to his presenting a petition for a compulsory winding-up or for a supervision order. But there is authority for saying that it is not a bar. In the case of *In re Bank of Gibraltar and Malta* (2) Lord Justice *Turner* expressed a very strong opinion that it was not within the jurisdiction of the Court to entertain a petition presented by a contributory after there had been a voluntary winding-up; since that case the question has frequently arisen; every important case on the subject is, I think, referred to in Mr. *Buckley's* very able and very useful book, of which I am happy to find there is a new edition bringing it down to the present time; and the result of the cases appears to be this, that the Court will not entertain a petition

(1) Law Rep. 1 Ch. 339. (2) Law Rep. 1 Ch. 69.

from a contributory after there has been a voluntary winding-up unless it is shewn that there has been fraud. There may be special circumstances, perhaps not amounting to fraud in the ordinary and everyday meaning of the word, but which are yet almost equivalent to fraud, and shew that there ought to be a compulsory order. There were such circumstances in the case of *In re Fire Annihilator Company* (1). In that case the voluntary winding-up had been going on for five years, and nothing had been done satisfactorily under it, and therefore the Court treated it as if there had been no voluntary winding-up at all, and made a compulsory order. The case that was relied upon by the Vice-Chancellor as one which supported his decision in granting the winding-up order on the present application was that of *In re Littlehampton Steam Packet Company* (2), but in that case the petition was presented before even the preliminary steps had been taken for obtaining a voluntary winding-up, though the resolution for the voluntary winding-up was passed before the compulsory order was made.

As regards the case of *In re West Surrey Tanning Company* (3), I have looked into the facts, and I find that a petition for a compulsory winding-up was presented in the interval between the first resolution for a voluntary winding-up and the meeting at which that resolution was confirmed, and therefore the Court had obtained jurisdiction over the case before there had been any complete voluntary winding-up. But even in that case there were special circumstances which I think would have justified the interference of the Court, namely, that the voluntary winding-up had been obtained, if not by fraudulent means within the ordinary intent and meaning of the word, yet by an overpowering body of shareholders acting under the influence of a single person. But I think the answer to any argument based upon *In re West Surrey Tanning Company* is this, that the Court had commenced its jurisdiction in the matter before there had been a complete voluntary winding-up resolution. A suggestion was made by Lord Justice *James* in the course of the argument, which I think is one of considerable weight, namely, that if you make a compulsory order for winding up upon the petition of a contributory after a voluntary

(1) 32 Beav. 561. (2) 2 D. J. & S. 521.
(3) Law Rep. 2 Eq. 737.

C. A. 1879 *In re* GOLD COMPANY. Baggallay, L.J.

winding-up has been resolved upon, you have this difficulty, although no doubt it is a difficulty you might have equally to deal with on a creditor's petition, namely, that you have a different period for the commencement of the winding-up. The voluntary winding-up dates from the time the first resolution is passed, but the compulsory winding-up dates from the time when the petition is presented, which certainly is an inconvenience not unnecessarily to be incurred. Therefore, though I do not think it necessary to express any decided opinion on the present occasion as to whether a contributory, after a voluntary winding-up has been resolved upon, can present a petition for a compulsory winding-up of the company, I still desire to intimate a very strong bias in my own mind at the present time in favour of the view that no such petition can properly be presented. But I think there is quite sufficient to dispose of this case without relying on that objection.

I think, also, that the objections are equally great to a contributory obtaining a supervision order, and this view has been from time to time acted upon. After there has been a resolution for a voluntary winding-up, it has always been held that a contributory must prove some very special circumstances before he can obtain a supervision order.

It has, however, been pressed upon us that cases have occurred in which a petition by a contributory for a compulsory order after a voluntary winding-up has been listened to and acted upon by the Court, but it will be found that those have been cases in which creditors have appeared and have supported the petition for the winding-up; and in those cases, possibly for the purpose of saving the necessity of dismissing one petition and causing another to be presented immediately afterwards, the Court has more than once made an order for a compulsory winding-up, although the creditor has not actually joined in the petition. In this case Mr. *Buckley*, suggesting that he appeared for a creditor, asked us to consider that the petition was supported by a creditor, but we can only deal with the order under appeal, and on the face of that order Mr. *Buckley* is only entered as appearing for shareholders supporting the petition and not on behalf of any creditor.

As regards the general merits of the case, I do not consider it necessary after what has been said by the Lord Justice to go

through the circumstances in detail. I have already pointed out that the Petitioner was for three years a shareholder in the company before he thought fit to present the present petition, and that he did not present it until nearly a twelvemonth after the time when the resolution for a voluntary winding-up was passed.

As I have already mentioned, he had the fullest opportunity of knowing the whole of the circumstances of the company. He purchased 100 shares in the company; he did not think it necessary to look at the articles of association for the purpose of seeing what powers the directors had and what they might have done under those powers. I do not think he has pledged his oath to the fact that he did not know of all these facts, but on the assumption that he was ignorant, he was only ignorant by reason of his own carelessness. Then is he the person to come here and complain of what has taken place? I cannot think that he is. Assume that but for his own conduct there was the fullest power and jurisdiction to come here and to ask either for a compulsory order or for a supervision order, it seems to me that he is barred by his own laches and by his own conduct from coming forward to raise these questions, assuming the irregularities charged by him to have been substantiated. With regard to these irregularities, he says that the resolution for a voluntary winding-up ought not to stand in his way, because it was obtained by fraud. Well, if the resolution for a voluntary winding-up had been obtained by fraud, and if that fraud had been clearly proved, I am by no means certain that this would not be a case in which the Court would entertain his petition and grant relief. But what are the facts? He first of all endeavoured to establish a technical objection that the requisite majority of three-fourths had not been obtained. He was, however, precluded from taking this objection by the terms of the section of the Act of Parliament, which says that where a poll is not demanded, there the decision of the chairman that the resolution has been carried is to be quite sufficient without any proof of the number of voters or the proportion of their votes. Had a poll been demanded, the voting would have been by a numerical calculation of the votes held by the various shareholders. Possibly there was a very sufficient reason why at that meeting no poll was demanded, apart from the question that it

C. A. 1879 *In re* GOLD COMPANY. Baggallay, L.J.

requires five shareholders to demand a poll, and he could not succeed in finding as many as five to support his views.

We must also bear in mind that there were only seventeen shareholders present at this meeting, and there were over 300 shareholders in the company, who for some reason or other did not think it necessary to attend the meeting. They knew what the meeting was summoned for, because the *Companies Act*, 1862, requires that when a meeting is convened for the purpose of winding up a company, that must be expressly stated in the notice summoning the meeting. I think we may fairly assume that they were indifferent to what was to be done. I think, therefore that any allegations to the effect that there were irregularities with respect to obtaining the winding-up resolution are entirely displaced by the evidence.

There is one other matter to which I would refer. It was suggested that if the Petitioner was not entitled to a compulsory order, or to a winding-up under supervision, he was at least entitled to have leave to prosecute proceedings against the directors, and, upon giving an indemnity, to use the name of the liquidator for the purpose. I think that this Court would grant relief of this kind when a proper case was made for it. A proper case was considered to be made for it in the case of *In re Imperial Bank of China* (1). But where are the circumstances in this case to authorize any such proceedings being taken. In all probability it was a suggestion of counsel after the petition was presented, and after it was brought on in Court. I do not know that such a course is now open to the Petitioner, still, if he is able to satisfy the Vice-Chancellor by an application under the 138th section of the *Companies Act*, he may possibly obtain leave to do that if any proper case be made for it; at present there does not appear to me to be any case made for it at all.

I have only to make one observation as far as regards the irregularities alleged to have been committed. As far as regards the formation of this company and the conduct of the directors with reference to it, I do not think it is material to the decision of this question whether those irregularities are established or not. For the reasons already assigned by the Lord Justice, and for those

(1) Law Rep. 1 Ch. 339.

assigned by myself, I do not think that the present Petitioner is the person to complain of them. But I do agree with the observations which were made by the Vice-Chancellor in this case, to the effect that he did not desire to express any opinion whether the 11th clause was inserted in the articles of association with any fraudulent intent, adding, "I do not express any opinion whether this clause was inserted with a fraudulent intent, but it certainly is a clause which may very well be turned to fraudulent purposes." Apart from what the particular object or purpose of the framers of that clause may have been, I must confess that it appears to me to be an attempt to evade the provisions of the *Companies Act*, 1867, with regard to the reduction of capital. It may have been such an evasion as keeps within the law, but if at any proper time the question had been raised whether that clause was *ultrà vires* or not, it appears to me that there would have been strong reasons for holding that it was.

BRAMWELL, L.J.:—

I am of the same opinion. I so entirely agree with all that has been said by my Brethren, that I shall say nothing except on one matter which has come before us, as to which I desire to say a few words, because I do not like simply to say that I assent to the blame which has been passed on these people without giving a reason for it. I think that clause 11 of the articles of association was a most improper clause; and although we ought to speak with hesitation, inasmuch as we have got neither the whole of the facts nor the parties before us to be heard in their defence, it seems to me almost impossible to think that it was not put into the deed for a fraudulent purpose. Let us see what it is: £25,000 are subscribed in one way or another, and then, by virtue of clause 11 and the resolution come to by the directors immediately after they were appointed and before they could really *bonâ fide* have known whether they would want more money or not, the apparently subscribed capital of the company, although £25,000 only had been subscribed, is made £100,000, and every man who was formerly a holder of one £1 share became a holder of four £1 paid-up shares. Well, now, as far as the company is concerned that did it no injury. Each man who held a share beforehand held

C. A. 1879 *In re* GOLD COMPANY. Bramwell, L.J.

one-twenty-five-thousandth part of the subscribed capital of the company, and the effect of what was done was simply to alter the denominator from £25,000 into £100,000, and to make each holder of a share the holder of four hundred-thousandth parts of the capital of the company, which is the same thing. Therefore, as far as the company was concerned, no harm was done to it at all, although they chose to call these four £1 paid-up shares, instead of calling them four 5*s.* paid-up shares, which would have been the truth. But the mischief that was done was done, not to the company or to any of their shareholders in the company, for they were all parties to it, and one got as much benefit as the others did, which was no benefit at all if they had kept their shares,—in that case it would have been utterly unimportant,—but the mischief that was done was this, that they could with these, what I must call pretended shares, go into the market, and of course any man having a £1 share offered to him for sale—for although if he had inquired he would, no doubt, have found out that in reality it was only a 5*s.* share, yet it is very well known that people do not do so—would think it was worth £1, or perhaps £1 with 1*s.* or 2*s.* or perhaps 5*s.* premium; but if he had been told the truth, that it represented 5*s.* only in money paid, it is not to be conceived that he would have given £1, which would have been putting it at a premium of 300 per cent. I have not the slightest doubt that many people were deluded, I will not say defrauded, because I do not like at the present moment to say that there was any intention to defraud in the matter—but many people were deluded into buying these shares upon the footing that they were buying that which represented a payment or value of £1 having been given by the original allottee, which is a most mischievous thing. Now, I am perfectly certain that all the shareholders were not fraudulent persons, for two reasons, both entirely satisfactory to my mind: one is, that amongst them are the names of persons who I am certain are incapable of fraud, and another is, that they did not all sell their shares, but many of them kept them, and therefore made no profit out of this transaction. But speaking with reserve, I cannot feel any doubt that while there were some persons who, I will not say were perfectly free from blame in the matter, but who had accepted without consideration what was done by others,

there were some also who by this clause, and what was done under it, intended the delusion upon the public which has been practised to the extent of about 50,000 shares in this case. The reason I make this remark is, that I am by no means clear that a remedy might not be had against such persons if any one could prove the case. I suppose there was some public announcement of the company as having a capital of £100,000 paid up, which was untrue. If anybody could prove that he had been deceived by that, he might be able to maintain an action against the fraudulent persons who had deluded him and caused damage to him. Another thing which it may be as well for gentlemen to bear in mind who have such schemes as this in their heads, is, that it is by no means clear that if they were indicted for a conspiracy they could not be very properly convicted and suffer punishment for it, for it is perfectly certain that in this case a false impression must have been created. It is impossible to suppose that these shares would have been sold at the average price at which they were sold, if the truth had been known. I have thought it right to express this opinion with a view to prevent others from repeating practices which are here so objectionable.

The appeal was accordingly allowed and the petition dismissed with costs.

Solicitors: *Stevens & Harries; Wild, Browne, & Wild; Morley & Shirreff.*

C. A.
1879
C. J. B.
Feb. 22.
C. A.
May 8.

Ex parte KIRKWOOD. *In re* MASON.

Liquidation Petition—Misdescription of Debtor—Registration of Resolutions—Amendment of Petition—Locus Standi—Creditor withdrawing Proof at First Meeting—Right to appear before Registrar and oppose Registration—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 82—*Bankruptcy Rules*, 1870, *rr.* 273, 295—*Bankruptcy Forms*, 1870, *No.* 106.

24 Ch D 419
481-3-4

A farmer, who had also carried on the business of a cattle dealer, filed a liquidation petition, in which he gave his correct address, but described himself only as a cattle dealer:—

Held, by *Bacon*, C.J., and by the Court of Appeal, that this was not a misdescription such as to invalidate the proceedings, and that the resolutions passed by the creditors ought to be registered.

Ex parte Jerningham (1) distinguished.

But leave was given to amend the petition by adding the description "farmer."

A person who alleged that he was a creditor tendered a proof of debt at the first meeting of the creditors, but withdrew it. He attended before the Registrar to oppose the registration of the resolutions passed by the creditors.

Held, by *Bacon*, C.J., and *semble*, *per James*, L.J., that the objector had no *locus standi*, and the Registrar could not put his proof on the file for the purpose of giving him a *locus standi*.

ON the 2nd of December, 1878, *George Draper Mason* filed a liquidation petition in the *Nottingham* County Court, describing himself in the petition as "of *Marston*, in the county of *Lincoln*, cattle dealer."

The first general meeting of the creditors was held on the 21st of December, when resolutions for the liquidation of the debtor's affairs by arrangement were passed. At this meeting *John Kirkwood*, who held a registered bill of sale of property of the debtor, attended, and tendered a proof of a debt which he alleged to be due to him from the debtor, but he withdrew his proof. On the 13th of January, 1879, he attended before the Registrar to oppose the registration of the resolutions. It was objected that he had no *locus standi*, because he had no proof of debt on the file of proceedings. He thereupon tendered his proof again, which stated that the debt due to him was £316, and that he estimated the value of his security at £315 19*s.* 11*d.* The Registrar admitted

(1) 9 Ch. D. 466.

the proof, and *Kirkwood* then objected to the registration on the ground that the debtor was really only a farmer and not a cattle dealer, and that the description in the petition was misleading. The Registrar allowed the objection, and refused to register the resolutions. His decision was affirmed by the Judge of the County Court.

On the hearing before the Judge the debtor was examined, and admitted that he was a farmer, occupying a farm of 300 acres. He stated that he had also made by sheep and cattle jobbing a profit which formed a large part of his income, but he said his neighbours would know him better by the description of "farmer" than by that of "cattle dealer." He had no reason for describing himself as a cattle dealer only. When he gave the bill of sale he was asked if he was in any business, and he then said he was a farmer, and did not say that he carried on any other business. In the bill of sale he was described as a farmer only.

The Judge held on the evidence that the debtor was not a cattle dealer; but that, if he was, he ought to have been described as a farmer and cattle dealer.

The debtor appealed to the Chief Judge. The appeal was heard on the 22nd of February, 1879.

E. Cooper Willis, and *Seward Brice,* for the Appellant:—

Kirkwood had no *locus standi* before the Registrar on the registration of the resolutions under rules 273, 295. Rule 295 directs the Registrar to hear "any creditor who shall have given him notice," but that can only apply to a creditor at the time the notice was given, which *Kirkwood* was not. But, even if he had a *locus standi,* can a man who comes in and proves for one penny, simply for the purpose of making an objection, be heard now in opposition to the resolutions of all the *bonâ fide* creditors, who never had the opportunity at the first meeting of objecting to his proof? But there has been really no misdescription; the description given is quite sufficient to identify the debtor. There is no evidence that any one would have been misled: *Ex parte Newall* (1); *Robson* on Bankruptcy (2). The defect, if defect there be, is one of form only and one for which leave to amend

(1) 3 Deac. 333. (2) 3rd Ed. p. 101.

C. A. 1879

Ex parte KIRKWOOD. *In re* MASON.

would be given: *Bankruptcy Act*, 1869, s. 82; *Ex parte Jerningham* (1). [They also referred to *Ex parte National Deposit Bank* (2).]

Winslow, Q.C., and *Northmore Lawrence*, for *Kirkwood*:—

Kirkwood was clearly a "person aggrieved" by the resolutions, within sect. 71 of the *Bankruptcy Act*, 1869, and therefore he could appeal from them: *Ex parte Learoyd* (3). The effect of that decision is that a creditor, whether a party to the order or not, can come and be heard in opposition to an adjudication; and the fact that this is a liquidation and not a bankruptcy does not affect *Kirkwood's* right to be heard. Rule 295 says "any creditor," not "any creditor who has a proof on the file." As to the description, the evidence shews that "cattle dealer" is wrong; the debtor was only a farmer. "Cattle dealer" is misleading. Besides it is clear that this description is only put in to make the debtor a trader, and so upset *Kirkwood's* bill of sale.

[BACON, C.J.:—Suppose the debtor had described himself as "cattle dealer and farmer," you could not have objected to that, and *Kirkwood* would have been in the same position as now.]

"Cattle dealer" alone is incorrect, and a creditor has a right to take every objection, technical or not, that is open to him to upset the liquidation: *Ex parte Dart* (4). For twenty years this debtor has been a farmer, and known as such; his alleged dealings in cattle have only been going on for the last two years at the most.

[BACON, C.J.:—Surely the extent or duration of the trading is immaterial: *Ex parte Bryant* (5).]

The debtor has omitted his chief business, which is the same thing in principle as omitting his private address. *Ex parte Jerningham* is conclusive. The error is one of substance, and is, therefore, fatal. It is not necessary to shew actual fraud or mischief: *Ex parte Lewis* (6).

(1) 9 Ch. D. 466.
(2) 26 W. R. 375, 624.
(3) 10 Ch. D. 3.
(4) 2 D. & Ch. 543.
(5) 1 V. & B. 211.
(6) 3 M. D. & D. 93.

BACON, C.J., after stating the facts, continued:—

The first question is whether Mr. *Kirkwood* has any *locus standi*. In my opinion he has none. The rules are very clear and distinct. The scheme, which is most carefully prepared and expressed in the rules, gives the creditors an opportunity of appearing and making their proofs, and rule 271 provides that any objection to a proof shall be marked thereon by the chairman of the meeting, and shall be dealt with by the Registrar on the resolution being presented to him for registration. That has not been done. Then rule 273 provides:—"That where any creditor shall desire to retire from any meeting, and not to be considered as present, he may withdraw his proof, without prejudice to his again proving his debt upon any subsequent occasion." What does "any subsequent occasion" mean? An occasion upon which debts can be proved; a meeting such as the statute prescribes. It does not mean any other occasion. It does not mean the occasion of the resolutions being registered before the Registrar. In my opinion he was bound to give notice—proper notice—of his objection to the registration, that it might be properly met. He did not do that, and in my opinion, therefore, he had no *locus standi* to prove for his penny, although his object (I do not say an unjust one, for I know nothing about the merits of the case) was at some other time, in some other shape, to dispute the validity of all the liquidation proceedings. That is not the meaning of the statute, or the rules. The course by which he might have proceeded is very plain. The case is wholly different from *Ex parte Jerningham* (1). There the creditor had objected to the resolutions at the meeting; it is so stated most distinctly. That was, therefore, only a renewal of his objection. This is a fresh substantive distinct proof for the sum of one penny, and upon that the creditor says he has a right to raise his objection. Well, what is the objection? that the debtor is described as a cattle dealer, when in fact he was a cattle dealer and farmer. The evidence that he was a cattle dealer (I say it with the greatest possible respect for the learned Judge whose order is appealed from) seems to me unquestionable. Several witnesses prove that he was a cattle dealer, that he acted as a cattle dealer. Is there anything inconsistent with it? It is

(1) 9 Ch. D. 466.

C. A. 1879

Ex parte KIRKWOOD. *In re* MASON.

C. J. B.

not like the case of *Ex parte Dart* (1), where an attorney took a shed, or shop, or room, and pretended to be a bookseller, a plain fraud upon the face of it. The business of a cattle dealer and that of a farmer are so cognate that a man may very well carry on both businesses. He could not be liable under the order and disposition clause of the *Bankruptcy Act* if he were only a farmer, but if he is a cattle dealer and farmer what difference does that make? The 82nd section of the Act, which enables the Court to amend any inaccurate description, seems to me to apply directly to this case, for the provision is that an amendment shall not be made if injustice is thereby done to anybody. What injustice can be done? This penny creditor under the liquidation says that he has got a bill of sale which is a perfectly good security, and he says that the debtor being a farmer his bill of sale cannot be invalidated. But how would that position be remedied? By adding to the description of the debtor that he was a farmer as well as a cattle dealer? If he was a cattle dealer he was a trader. If he was a farmer twenty times over it could not make any sort of difference: no injustice is done by it. If it is necessary, the description may be amended—he may be described as a farmer as well as a cattle dealer. But, unless the evidence is clear that he never was a cattle dealer, I can see no reason in the world why these proceedings in the interest of the general creditors should be set aside at the instance of Mr. *Kirkwood*, who says that he has a valid bill of sale. Whether he has or has not, remains to be tried. The cases cited, where an erroneous description was likely to mislead, where there were reasons to believe that it was resorted to fraudulently, have no application. The village, not a large one, in which the debtor lives is properly described, the fact of his being a cattle dealer, is, in my opinion, established: and if this penny creditor had, as I consider he had not, a *locus standi* before the Registrar, still there would be no ground upon which he could ask that the proceedings should be avoided. In my opinion, therefore, the resolutions must be registered.

Leave was given to amend the petition by adding the description "and farmer."

(1) 2 D. & Ch. 543.

From this decision *Kirkwood* appealed. The appeal was heard on the 8th of May, 1879.

Winslow, Q.C., and *Northmore Lawrence*, for the Appellant, repeated the arguments which they had addressed to the Chief Judge on the question of misdescription, referring to *Bankruptcy Act*, 1869, sects. 10, 82, 127; Bankruptcy Rules, 1870, r. 252; Bankruptcy Forms, 1870, No. 106: *Ex parte Jerningham* (1); *Ex parte Lewis* (2); *Ex parte Learoyd* (3).

They were not heard on the question of *locus standi*.

E. Cooper Willis, and *Seward Brice*, for the debtor, were not heard.

The judgment of the Chief Judge was read to the Court.

JAMES, L.J.:—

I am of opinion that it is not necessary for us to consider the second point, upon which, however, as at present advised, I am quite clear. It would require a great deal of argument to satisfy me that the Chief Judge was not right upon that point. But the other point is enough to dispose of the case.

In *Ex parte Jerningham* we were of opinion that the description given by the debtor was really misleading, because he did not give his private residence, so that his private creditors would not know anything about him. But here the Chief Judge was of opinion that no such case was made out. No one could really have been misled by the fact that this debtor called himself a cattle dealer, which was a business that he actually carried on. He was a farmer really, but no one seems to have been misled. The Appellant was not misled; he knew very well what the man was, and no one else was misled. I am as certain as I can be of anything that no human being could have been misled by the description of "cattle dealer," because every one knows that it is one of the commonest things in the world for a farmer to be a cattle dealer also. I am of opinion that the order is right.

(1) 9 Ch. D. 436. (2) 3 M. D. & D. 93.
(3) 10 Ch. D. 3.

C. A. 1879

Ex parte KIRKWOOD. *In re* MASON.

BRETT, L.J.:—

I am of the same opinion. I am perfectly certain that if any creditor of Mr. *Mason*, of *Marston*, had seen an advertisement that Mr. *Mason*, of *Marston*, a cattle dealer, had filed a liquidation petition, he would have jumped in his shoes and would have gone to look for Mr. *Mason*, who was a farmer as well as a cattle dealer. The case is not at all like *Ex parte Jerningham* (1), where the description of the debtor was really misleading.

COTTON, L.J.:—

The objection is that the resolutions ought not to be registered, on the ground that the petition contained a bad description of the debtor. There is no section in the Act which in any way prescribes what is to be given in the petition as the description of the debtor, but the petition is to be advertised, and the form No. 106 in the Schedule to the Rules supposes that there will be some description of the petitioner; and I am of opinion, as we laid down in *Ex parte Jerningham*, that it is necessary that the description should be in no way misleading, that it should be such a description as will give fair notice to the creditors of all classes who it is that is applying for the benefit of the Act. Well, here the case is very different from *Ex parte Jerningham*. There a man was carrying on his business at one place and was residing at another, and he gave his address simply at the place where he carried on his business. That was no possible notice to those creditors who did not know him as a trader, but had dealt with him as a private gentleman at his private residence. But here we have simply this, that a man, being a farmer and a cattle dealer, and residing at a place called *Marston*, describes himself in his petition as "*George Draper Mason*, of *Marston*, in the county of *Lincoln*, cattle dealer." I think that no one can say that any creditor who had had dealings with Mr. *Mason*, of *Marston*, as a farmer, would not receive full and sufficient notice that that person was applying to take the benefit of the Act, when he saw the advertisement of this petition. It is perfectly legitimate to shew that there has been something misleading, or that any creditor has not got fair notice, but I think that the

(1) 9 Ch. D. 466.

party who takes the objection must shew that there is a probability of some one not receiving sufficient notice. In the present case, the businesses of cattle dealer and farmer being so cognate, I think it is impossible for any creditor of this debtor as a farmer to say that he did not know that it was he who was applying to take the benefit of the Act. The description, though not entirely complete, was, in my opinion, one which of necessity gave fair notice to all his creditors in whichever capacity. The appeal will be dismissed with costs.

C. A. 1879 *Ex parte* KIRKWOOD. *In re* MASON.

Solicitor for Appellant: *W. F. Watson*, agent for *Newton, Jones, & Champion, East Retford.*

Solicitor for Respondent: *G. F. Moresby White.*

Ex parte CHICK. *In re* MEREDITH.

C. A. 1879 C. J. B. *Feb.* 10. C. A. *May* 8, 9, 15.

Beneficed Clergyman—Sequestration of Profits of Benefice—Trustee in Bankruptcy—Priority—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 88.

Held, by *James* and *Cotton*, L.JJ. (*dissentiente Brett*, L.J.), that the effect of sect. 88 of the *Bankruptcy Act*, 1869, is only to give priority to a sequestration issued by the trustee in the bankruptcy of a beneficed clergyman over a sequestration issued by an individual creditor in respect of a debt provable in the bankruptcy, but that the section has no application as between sequestrations issued by the trustees in two different bankruptcies.

Held, by the Court unanimously, that the fact that a bankrupt beneficed clergyman has obtained an order of discharge does not prevent the trustee in the bankruptcy from issuing a sequestration of the profits of the benefice which the bankrupt held at the time of the bankruptcy.

ON the 8th of May, 1869, the Rev. *R. F. Meredith*, vicar of *Halstock, Dorsetshire*, was adjudicated a bankrupt, upon his own petition, under the *Bankruptcy Act*, 1861, in the Court of Bankruptcy for the *Exeter* District, and on the 25th of November, 1869, he obtained his order of discharge. On the 31st of August, 1870, the proceedings in the bankruptcy were, by an order of the Lord Chancellor, transferred to the *Exeter* County Court. On the 6th of October, 1874, Mr. *Meredith* filed a liquidation petition in the *Yeovil* County Court. The creditors failed to pass any resolution,

C. A. 1879 *Ex parte* CHICK. *In re* MEREDITH.

and on the 24th of December, 1874, the debtor was adjudicated a bankrupt, the filing of the liquidation petition being the act of bankruptcy. At the commencement of the first bankruptcy two sequestrations, issued by two individual creditors, were in force against the profits of Mr. *Meredith's* benefice. One of these sequestrations having become satisfied out of the profits of the benefice, and the other being partially satisfied, the assignee in the first bankruptcy, on the 5th of November, 1874, issued a sequestration of the profits of the benefice, and on the 26th of July, 1875, the trustee in the second bankruptcy issued a similar sequestration. The second of the sequestrations issued prior to the first bankruptcy having become satisfied, the trustee in the second bankruptcy claimed priority for his sequestration over that of the assignee in the first bankruptcy. It was alleged and scarcely disputed that when the sequestration of the 5th of November, 1874, was issued the assignee in the first bankruptcy had notice of the filing of the liquidation petition. The Registrar of the *Yeovil* County Court, acting as Judge, decided that the sequestration of the assignee in the first bankruptcy was entitled to priority. The trustee in the second bankruptcy appealed to the Chief Judge.

The appeal was heard on the 10th of February, 1879.

Finlay Knight, for the Appellant:—

Prior to 1861, clerks in orders were not subject to the bankrupt laws at all; there was no distinct provision as to them. But the Act of 1861 (24 & 25 Vict. c. 134) empowered the assignees (sect. 135) to apply for and obtain a sequestration of the profits of the benefice. Sect. 88 of the present Act is a re-enactment in slightly different terms of sect. 135 of the Act of 1861.

The bankrupt having obtained his order of discharge in the bankruptcy of 1869, there is no property, and no right to apply for a sequestration, left in the assignee (now the trustee) under that bankruptcy. It has been repeatedly held that the profits of a benefice do not pass to the official assignee: all that passes are the fruits of a sequestration: *Hopkins* v. *Clarke* (1).

[BACON, C.J.:—An assignee, or a trustee, does not become a

(1) 4 B. & S. 836; 5 B. & S. 753.

parson. The estate of the clergyman does not vest in him, because, among other good reasons, he himself cannot go and officiate in person. Sequestration is granted on the terms that the sequestrator provides for the services.] C. A. 1879 *Ex parte* CHICK. *In re* MEREDITH.

The right to obtain a sequestration is one which an assignee cannot exercise after an order of discharge.

[BACON, C.J.:—The order of discharge has nothing to do with the rights vested in the trustee.]

It prevents possession being taken of the property by the former assignee or trustee. Our sequestration was obtained under a new title.

Edward Pollock, for the assignee in the first bankruptcy, was not called upon.

BACON, C.J.:—

In my opinion the right of the Respondent is not to be disputed. This peculiar kind of interest which a parson has was made the subject of peculiar provisions in the Bankruptcy and Insolvency Acts. The estate cannot vest in the assignee, because he is a layman; it is an estate which can only be held by a clerk. But then the law is not to be defeated by that circumstance. It says the profits of the living are applicable for the payment of the creditors, that the trustee or assignee in bankruptcy has a right to issue a sequestration, which remains operative so long as the creditors are unpaid. The bankrupt may be discharged, he may go about his business in any way he likes, but the profits of the living remain applicable by the assignee in virtue of his sequestration until all the creditors are satisfied. It would be preposterous and unreasonable to suppose that a subsequent sequestration can disturb the title acquired under the former one. The learned Judge has decided that the first sequestration has priority over the second, and in my opinion that is the right order to make. The appeal will be dismissed with costs.

From this decision the trustee in the second bankruptcy appealed. The appeal was heard on the 8th and 9th of May, 1879. C. A.

C. A.
1879
Ex parte CHICK.
In re MEREDITH.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

After the bankrupt had obtained his discharge in the first bankruptcy, the assignee had no power to issue a sequestration.

Power was given to the assignee of an insolvent beneficed clergyman to apply for a sequestration of the profits of his benefice by 7 Geo. 4. c. 57, s. 28. That section was construed in *Bishop* v. *Hatch* (1), which decided that the assignee had no title to the profits of the benefice until he had issued a sequestration. A judgment creditor who issued a sequestration before the assignee obtained priority over him. Sect. 55 of 1 & 2 Vict. c. 110, contained a similar provision. Then in *Hopkins* v. *Clarke* (2), it was held, with reference to sect. 135 of the *Bankruptcy Act*, 1861, that, until the assignee's sequestration had been issued, the profits of the benefice formed no part of the bankrupt's estate divisible among his creditors, and that a judgment creditor who had issued a sequestration before the assignee had a better title. Sect. 135 of the *Bankruptcy Act*, 1861, says nothing about priority. But no one can issue a sequestration for a debt which has been discharged. The effect of the order of discharge was to discharge all the debts provable in the bankruptcy: *Bankruptcy Act*, 1861, s. 161. A sequestration is a proceeding in the nature of an execution in an action. If the parson had exchanged livings, surely the assignee could not issue execution against the profits of the new living; there must be some limit to his rights under sect. 135. The profits of the benefice accruing after the order of discharge are after-acquired property, which can only be reached under sect. 159 of the *Bankruptcy Act*, 1861.

But, at any rate, sect. 88 (3) of the *Bankruptcy Act*, 1869, gives

(1) 1 A. & E. 171.

(2) 4 B. & S. 836; 5 B. & S. 753.

(3) Sect. 88 provides that "where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy, except a sequestration issued before the date of the order of adjudication by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication."

(4) 8 C. B. (N. S.) 439, 1071

priority to the sequestration issued by the trustee in the second bankruptcy. The assignee in the first bankruptcy issued his sequestration after the commencement of the second bankruptcy, and, as we say, with notice of the act of bankruptcy; at any rate, the *onus* is on him to shew that he had no notice of the act of bankruptcy: *Ex parte Schulte* (1).

JAMES, L.J.:—We need only call on the Respondent with reference to sect. 88; it appears to us that the bankrupt's discharge does not take away from the assignee the right which the statute gives him to issue a sequestration.

De Gex, Q.C., and *Charles Hall*, for the trustee in the second bankruptcy:—

Sect. 88 cannot be construed literally; such a construction would lead to absurd results.

It is a well settled principle that statutes are to be construed even contrary to the literal meaning for the purpose of effectuating the intent: *Stradling* v. *Morgan* (2); *Hawkins* v. *Gathercole* (3); *Warren* v. *Rudall* (4), where Lord *Hatherley* (then Vice-Chancellor *Wood*) quoted (5) a passage from *Cicero's* Oratio pro Cæcinâ, in which a similar principle is enunciated. The object of sect. 88 is simply to put a sequestration issued by an individual creditor of an ecclesiastical person in the same position as an execution issued by a creditor of a lay person; to give priority to the trustee's sequestration over that of any creditor who is entitled to prove in the bankruptcy, in other words to provide for the equal distribution of the bankrupt's assets among his creditors. It was intended to meet the decision in *Hopkins* v. *Clarke* (6). If sect. 88 meant that the trustee's sequestration should have priority over every sequestration issued after the act of bankruptcy, and with notice of it, it would repeal the express provisions of sect. 110 of 1 & 2 Vict. c. 106. Sect. 54 of that Act enables the bishop to enforce the residence of a clergyman by a sequestration of the profits of the benefice, and sect. 110 gives priority to sequestrations issued under the provisions of the Act over all other sequestrations,

(1) Law Rep. 9 Ch. 409.
(2) Plowd. 199.
(3) 6 D. M. & G. 1.
(4) 4 K. & J. 603.
(5) Ibid. 610.
(6) 4 B. & S. 836; 5 B. & S. 753.

C. A. 1879 *Ex parte* CHICK. *In re* MEREDITH.

with certain exceptions. Suppose there were two successive bankruptcies of a beneficed clergyman under the Act of 1869, and the trustees under both issued sequestrations after the second adjudication, then, if sect. 88 be construed literally, the first trustee's sequestration must have priority over that of the second trustee, which was issued after the first adjudication, and the second trustee's sequestration must have priority over that of the first trustee which was issued after the second adjudication. This is enough to shew that the section cannot be construed literally. Under the *Bankruptcy Act*, 1861, the assignee in the first bankruptcy had an inchoate right to issue a sequestration so soon as it should be profitable for him to do so; it cannot be supposed that the *Bankruptcy Act*, 1869, was intended to destroy that right, especially when the *Bankruptcy Repeal Act*, 1869 (32 & 33 Vict. c. 83), which repeals the *Bankruptcy Act*, 1861, by sect. 20 expressly preserves "any right, title, obligation, or liability accrued before the commencement of the Act."

Winslow, in reply:—

The assignee in the first bankruptcy ought to have issued a sequestration, even if he could not execute it immediately. When a bankrupt obtains his discharge, persons dealing with him have a right to suppose that he is free from debt, and that they may give him credit. If he holds a benefice they are entitled to look to the profits of it as a fund out of which they can be paid. If the assignee had issued a sequestration any persons desiring to trust the bankrupt could have searched and ascertained the fact, and then they would have trusted him at their peril. But, if he is allowed to hold himself to the world as a free man, what right has the assignee to come after any length of time and sweep away the fund to which the subsequent creditors trusted? The principle of the doctrine of reputed ownership applies, and there is no reason why the section should not be construed literally.

May 15. COTTON, L.J.:—

This is an appeal by the trustee in bankruptcy from an order of the Chief Judge, whereby he decided that a sequestration

issued at the instance of the assignee of the bankrupt under a former bankruptcy, but after the commencement of the second bankruptcy, had priority over a sequestration subsequently issued at the instance of the Appellant. The sequestration at the instance of the assignee under the earlier bankruptcy was issued after the bankrupt had obtained a discharge under that bankruptcy, and it was argued for the Appellant that under these circumstances the assignee could not issue a sequestration, and that the earlier sequestration must be treated as of no effect, and this was put on the ground that by the bankrupt's discharge the debts proved under that bankruptcy were released and gone, and that no sequestration to provide for the payment thereof could be obtained. But this, in my opinion, cannot be sustained. The discharge frees the bankrupt from personal liability to be sued in respect of debts proved under the bankruptcy, and no property to which he becomes entitled after the date of the discharge can, as a rule, be made applicable for their payment. But the debts, unless 20*s.* in the pound is paid, remain, and the benefice, the profits of which are sequestered, was property to which the bankrupt was entitled before the order of discharge. The 135th section of the Act of 1861, under which the earlier sequestration was issued, fixes no time within which the sequestration is to be applied for, and I am of opinion that it was, notwithstanding the discharge, open to the assignee under the earlier bankruptcy to issue the sequestration. The 135th section, which enables an assignee of the beneficed clerk to obtain a sequestration in order to have the profits of his benefice applied under the bankruptcy in payment of his debts, says nothing as to the priority of any sequestration when issued. But sect. 88 of the *Bankruptcy Act*, 1869, in pursuance of which the Appellant obtained a sequestration, does contain a provision as to the priority of a sequestration issued under it, and it was argued for the Appellant that, by virtue of this provision, he is entitled to priority over any sequestration issued subsequently to the commencement of the bankruptcy, even though issued on the application of an assignee in bankruptcy. The words of the 88th section of the Act of 1869 are quite general, and, taken without reference to the object of this and similar provisions of the bankruptcy code, support the Appellant's contention.

C. A. 1879 *Ex parte* CHICK. *In re* MEREDITH. Cotton, L.J.

But the question would equally arise if there were two successive bankruptcies under the Act of 1869, and successive sequestrations were issued by the trustees under each bankruptcy, and, on the literal construction contended for by the Appellant, it would be possible to shew that each sequestration was entitled to priority over the other. The provision is, therefore, inapplicable to questions of priority between different bankruptcies. In my opinion the true explanation and construction of this clause depends on a consideration of the circumstances under which, and the object for which, the enactment was made. An ecclesiastical benefice could not be made to vest in the trustee for the purpose of paying the creditors, it could only be made available for the purpose by means of a sequestration. To secure an equal distribution of the profits of the benefice among the creditors whose debts could be proved under the bankruptcy, it was necessary to prevent one of them obtaining a sequestration between the commencement of the bankruptcy and the time when the trustee should procure a sequestration to be issued, and I am of opinion that this provision as to the priority of the sequestration obtained by the trustee was introduced into the Act of 1869 to secure the profits of the benefice being applied rateably among the creditors entitled to prove under the bankruptcy, as if it were property which could be vested in the trustee, and to prevent any creditor, whose debt was provable under the bankruptcy, from obtaining a preference for himself to the prejudice of the other creditors. I am of opinion that it was not in any way intended to affect the right of priority of the creditors under any other bankruptcy. In my opinion the sequestration obtained by the assignee under the first bankruptcy is not a sequestration over which priority is given by sect. 88, and as it is earlier in date it must have priority. In my opinion the appeal must be dismissed.

BRETT, L.J. :—

I am sorry to differ from the other members of the Court, but it appears to me that the case is one of very little consequence. The only question is, what is the proper rule for the construction of a statute. We have been referred to a passage in *Cicero*, which is said to give the rule for construing an English statute. To my

mind, to quote *Cicero* for such a purpose is too ambitious. I am disposed to follow the rule of construction which was laid down by Lord *Denman* and Baron *Parke*, and that is quite far enough for me to go back. They said that in construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used. In the present case, if we take the literal meaning of the words of sect. 88, it is obvious that Mr. *Winslow's* client must succeed; it is only by introducing some limitation of the words that we can decide against him. Is there any reason why we should introduce any limitation of the words? A state of things has been suggested which, as it seems to me, could only be suggested by the finest and most skilled intellect which could be brought to bear upon bankruptcy law, and it is said that this imaginary puzzle shews that the Legislature could not have intended their words to be construed literally. I am of opinion that the Legislature did not intend to deal with this puzzle, simply because it never occurred to them at all. But it seems to me that it is not a logical conclusion that because they did not intend that, therefore they did mean something else different from what they have said. I cannot see that the discovery of this puzzle ought to lead us to limit the words in any way. I prefer the more business-like view which has been suggested by Mr. *Winslow*, which I think is much more likely to have been present to the minds of the framers of the section than this ingenious refinement. Mr. *Winslow* says that the creditors, subsequent to the discharge in the first bankruptcy, had a right to suppose that the bankrupt's benefice was free, and that it was intended to give them a preference. If the first assignee chooses to lie by, the trustee in the second bankruptcy ought to have the preference, and it is very likely that it was intended to give priority to the creditors under a second bankruptcy over those in the first, in order to force the trustee in the first bankruptcy to issue his sequestration before the second bankruptcy. That reasoning, at any rate, seems to me preferable to the ingenious refinement which I may almost say is the invention of a skilled intellect.

JAMES, L.J.:—

I agree in the opinion of Lord Justice *Cotton*, and in the reasons

C. A. 1879 *Ex parte* CHICK. *In re* MEREDITH.

which he has given for it, but I wish to add a few observations of my own. Sect. 88 is expressed in the most general terms, and, if construed literally, would apply to every sequestration. It is obvious that there are sequestrations which are not issued by a creditor at all. There are sequestrations which the bishop is bound to issue for the purpose of compelling the parson to fulfil his spiritual duties, or to repair the buildings belonging to the benefice. Sequestrations may also be issued for the recouping of loans to Queen *Anne's* Bounty. If we were to construe sect. 88 literally, it would deprive the bishop of all power to issue any sequestration for any of those purposes, or for any purpose whatever after the parson had been adjudicated a bankrupt. This, as it seems to me, amounts to a *reductio ad absurdum*. You cannot give the literal meaning to the words without going contrary to common sense and common justice. And, if you cannot give the literal meaning, and it seems to me in that respect a much stronger case than *Hawkins* v. *Gathercole* (1), you must limit the meaning by the object and intention of the Act. That object was to provide for the distribution of the bankrupt's assets, *i.e.*, for their equal distribution among the creditors who could come in and prove in the bankruptcy. That, as it seems to me, was the plain object and intent, and it is quite clear that it could have no application as between two bankruptcies under the Act of 1869, and I can see no reason why it should apply as between a bankruptcy under that Act and a bankruptcy under the former Act of 1861. Besides, the trustee under the later bankruptcy does not represent the creditors under the former bankruptcy, as they could not prove under the later bankruptcy, and they are not persons for whose benefit the provision was made. The meaning of the words must be limited in some way, and the only way of limiting them is by confining them to sequestrations issued by creditors who could come in and prove under the particular bankruptcy.

Solicitors for Appellant: *Coode, Kingdon, & Cotton,* agents for *J. H. Jolliffe, Crewkerne.*

Solicitors for Respondent: *J. E. Fox & Co.,* agents for *H. W. Hooper, Exeter.*

(1) 6 D. M. & G. 1.

C. A.
1879
April 30.

POLINI *v.* GRAY.

[1873 P. 162.]

STURLA *v.* FRECCIA.

[1876 S. 353.]

Practice—Appeal—Security for Costs.

It is not the practice of the Court of Appeal when ordering an Appellant to give security for costs to fix a time within which this is to be done. If the order is not complied with in a reasonable time the Respondent may move to dismiss the appeal for want of prosecution; but what is a reasonable time must depend on the circumstances of each case.

In re Ivory (1) explained.

THE suit of *Polini* v. *Gray* was instituted to ascertain the persons entitled to the estate of Mrs. *Maria Brown*, who died in the year 1871 possessed of personal property exceeding £200,000. She was the only daughter of *Antonio Mangini*, formerly consul of the Ligurian Republic in *London*. After considerable litigation, the Court decided that the family of the *Freccias*, who were five in number, were entitled in equal shares to the property, as being the next of kin of *Antonio Mangini*. After two of the shares had been paid out of Court, Madame *Sturla* and others commenced the action of *Sturla* v. *Freccia*, claiming the property as nearer of kin to *Mangini* than the *Freccia* family. The case was heard by Vice-Chancellor *Malins* in January, 1879, on a summons to vary the Chief Clerk's certificate, and on the 26th of February his Lordship decided in favour of the *Freccia* family, and dismissed the action of *Sturla* v. *Freccia* with costs. But in order that the unsuccessful parties might have an opportunity of considering the grounds of his decision, he continued the injunction which had been granted restraining the Defendants from taking out the fund which was still in Court in *Polini* v. *Gray* till further order.

(1) 10 Ch. D. 372.

C. A. 1879 — POLINI v. GRAY. — STURLA v. FRECCIA.

The Plaintiffs in *Sturla* v. *Freccia* gave notice of appeal against this decision.

On the 26th of March the Defendants applied to the Court of Appeal that the Plaintiffs might give security for costs, and their Lordships ordered that the sum of £1500 should be deposited in Court by the Plaintiffs.

On the 26th of April, that sum not having been paid into Court, the Defendants gave notice of motion that the appeal of the Plaintiffs against the order of the 26th of February might be dismissed for want of prosecution, and that the injunction restraining the payment of the fund in Court might be dissolved, and the fund in Court paid to the Defendants; or that a day might be fixed for payment of the security.

Bagshawe, Q.C., and *Eyre*, for the Defendants the *Freccias*:—

A reasonable time has passed for the payment of the sum named as security, and the Defendants are now entitled to have the appeal dismissed: *In re Ivory* (1). In that case the appeal was dismissed after the appellant had made default for a month. If the Court should not think fit to dismiss the appeal at once, we ask that a time may be fixed within which the security shall be paid in.

Higgins, Q.C., and *Everitt*, for other Defendants.

J. Pearson, Q.C., and *E. Beaumont*, for the Appellants:—

Since the order for giving security was made the Plaintiffs have done their best to raise the money required, and we have reason to believe that it will be paid into Court in a few days. It is the practice of the Court to allow a much longer time than a month to elapse before making such an order as that now asked for.

Bagshawe, in reply.

JESSEL, M.R.:—

This is an application to dismiss an appeal for want of prosecu-

(1) 10 Ch. D. 372.

tion, on the ground that security for costs has not been given within a reasonable time, or that a day may be fixed for giving such security. The practice is settled that the Court of Appeal does not fix a time for giving security, but if the appellant does not give security within a reasonable time the respondent may move to dismiss the appeal for want of prosecution. In *Vale* v. *Oppert* (1) the time which had elapsed was four months, but the question what is a reasonable time must depend on the circumstances of each case. We cannot lay down what is a reasonable time in all cases.

Therefore the question in the present case is whether a reasonable time has elapsed since the order for giving security was made, which was on the 26th of March. We have been referred to *In re Ivory* (2), in which case the appellant, who was a pauper receiving parish relief, was ordered on the 2nd of November to deposit £20 in Court; and it appears by a note at the end of the report that on the 27th of November the appeal was dismissed for want of prosecution. But no particulars are stated from which we may tell why the order to dismiss was made so early. The appellant may not have appeared, or he may have appeared and said that he did not mean to go on with the appeal (3). It was a peculiar case, and the Court probably thought it was merely a speculative appeal.

But here we have to deal with an appeal involving a very large sum of money, and the security to be deposited is £1500. The order was made on the 26th of March, and there was afterwards some discussion whether the Appellant should pay money into Court or give security. The time that has elapsed since that day cannot be said to be unreasonable. I think this motion must be refused with costs.

BRETT, L.J.:—

I am of the same opinion. I only wish to add that it seems to have been thought that there is a difference in the practice in

(1) 5 Ch. D. 633.
(2) 10 Ch. D. 372.
(3) The appellant was served with the notice of motion to dismiss the appeal for want of prosecution, but did not appear.

C. A. 1879

POLINI v. GRAY.

STURLA v. FRECCIA.

appeals from the Chancery and Common Law Divisions on this subject. I am not aware of any such difference.

With respect to the case of *In re Ivory* (1), I have no doubt that the Court was satisfied that the appellant did not mean to go on with the appeal.

COTTON, L.J., concurred.

Solicitors: *Lowless & Co.; G. L. P. Eyre & Co.; Foster & Spicer.*

(1) 10 Ch. D. 372.

SWEETAPPLE *v.* HORLOCK.

M. R.
1879
April 7.

[1879 S. 164.]

Marriage Settlement—Covenant to settle Wife's Property—Appointment to Wife—Instrument creating Power—Period of Vesting—Acquisition of Interest by Appointee.

Under a marriage settlement real estate stood limited to *H.*, the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; and in default of appointment, to the use of the children of the marriage equally as tenants in common in fee.

There was issue of the marriage two children only, a son and a daughter. The daughter married, and by her marriage settlement she and her intended husband covenanted with the trustees for the conveyance and settlement of all property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests.

The daughter survived her husband, and thereupon *H.* by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son and daughter equally in fee, the daughter thus taking the same share as she would have taken in default of appointment:—

Held, that inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement.

In re Frowd's Settlement (1), *In re Vizard's Trusts* (2), and *De Serre* v. *Clarke* (3), discussed.

BY the settlement, dated the 1st of October, 1832, made on the marriage of Dr. and Mrs. *Horlock*, certain real estate of considerable value belonging to Dr. *Horlock* was settled to the use of Dr. *Horlock* for life, with remainder to certain uses in favour of Mrs. *Horlock*—which failed in consequence of her death in her husband's lifetime—with remainder to the use of an only child or of such one or more of all the children or issue of the said marriage living at the decease of Dr. *Horlock*, or to the use both of all or such one or more of the children or issue of the said marriage living as aforesaid, at such times, for such estates or interests, and in such shares, as Dr. *Horlock* should by deed, with or without power of revocation, or by will or codicil, appoint; and, in default

(1) 10 L. T. (N.S.) 367; 4 N. R. 54. (2) Law Rep. 1 Ch. 588.
(3) Law Rep. 18 Eq. 587.

M. R. 1879 SWEETAPPLE v. HORLOCK.

of such appointment, to the use of an only child, or to the use of all the children or issue of the said marriage as Mrs. *Horlock*, if she should survive her husband, should appoint; and, in default thereof, to the use of the child or children of the said marriage equally as tenants in common, and the heirs and assigns of such child or children respectively.

Mrs. *Horlock* died in 1858.

There was issue of the said marriage two children only, a son, and a daughter, *Elizabeth Horlock*, who attained twenty-one and married *Thomas Sweetapple*.

By the settlement, dated the 11th of February, 1861, made prior to the marriage of Mr. and Mrs. *Sweetapple*, certain personal estate belonging to the latter was settled upon trusts for the husband and wife and their children. The settlement then contained a covenant by the husband and wife with the trustees as follows: "In case the said *Elizabeth Horlock* now is, or if at any time during the continuance of her said intended coverture, she the said *Elizabeth Horlock*, or the said *Thomas Sweetapple* in her right, shall, by transmission, devise, bequest, gift, conveyance, donation, representation, inheritance, or otherwise, become beneficially seised of, or interested in, or entitled to, any real or personal property, estate or effects whatsoever, not being the premises hereinbefore settled by her the said *Elizabeth Horlock*, or intended so to be, of the value or to the amount of £100 at any one time, for any estate or interest whatsoever (other than and except interests which shall be effectually settled to the separate use and benefit of her the said *Elizabeth Horlock*, and other than and except jewels, &c.), then and in such case" the husband and wife would at the cost of the trust estate convey and assure all such real and personal estate to the trustees upon trust, as to the real estate and as to such part of the personal estate as should not consist of money, "with all convenient speed, after such interest of the said *Elizabeth Horlock* or of the said *Thomas Sweetapple* in her right shall fall into possession, to sell, dispose of, and convert into money the same," and to hold the proceeds upon the trusts declared concerning the wife's property thereinbefore settled.

There was issue of the marriage of Mr. and Mrs. *Sweetapple* one child only, now an infant.

Mr. *Sweetapple* died in 1867.

By a deed-poll, dated the 26th of June, 1873, Dr. *Horlock*, in exercise of the power given him by his marriage settlement, irrevocably appointed the whole of the real estate thereby settled, after his decease, to the use of his son and daughter, their heirs and assigns, as tenants in common.

Dr. *Horlock* was still living.

The question was whether the undivided moiety appointed to Mrs. *Sweetapple* by her father was bound by the above-mentioned covenant contained in her marriage settlement.

The question was raised by an action by Mrs. *Sweetapple* against her trustees and infant child, to have it declared that her moiety was not so bound.

Ince, Q.C., and *Shebbeare*, for the Plaintiff:—

The only authority directly against our view is *In re Frowd's Settlement* (1), before Vice-Chancellor *Wood*; but that decision is contrary to *Lee* v. *Olding* (2), and was overruled by the Court of Appeal in *In re Vizard's Trusts* (3), an authority which Vice-Chancellor *Malins* felt himself bound to follow in *De Serre* v. *Clarke* (4).

Dobbs, for the Defendants:—

I rely on *In re Frowd's Settlement*, which I submit was not overruled by *In re Vizard's Trusts*, for the Lord Justice *Turner* does not even notice the case in his judgment, although it was discussed in argument. The actual ground of the Lord Justice's decision was that the interest of the appointee under the original settlement was altered by the exercise of the power, which is not the case here; and it is to be noticed that he expressly declines to say that the appointment was sufficient of itself to defeat the original limitations in default of appointment. Moreover, Vice-Chancellor *Malins*, in *De Serre* v. *Clarke*, expressed his concurrence with Vice-Chancellor *Wood's* view, though he considered himself bound by *In re Vizard's Trusts*.

The result, therefore, is that the decision in *In re Frowd's Settle-*

(1) 10 L. T. (N.S.) 367; 4 N. R. 54.
(2) 25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850.
(3) Law Rep. 1 Ch. 588.
(4) Ibid. 18 Eq. 587.

M. R.
1879
SWEETAPPLE v. HORLOCK.

ment (1) practically remains untouched, and that in the present case, inasmuch as Mrs. *Sweetapple* had at the date of her marriage, under her father and mother's settlement, an interest actually vested in her, and not really altered by the subsequent appointment that interest is bound by the covenant.

JESSEL, M.R.:—

I do not feel any doubt as to this case.

I must, first of all, consider the question independently of the authorities, and then see what the authorities compel me to decide. [His Lordship then read Dr. *Horlock's* settlement as above stated, and continued:—]

So that, at the date of the marriage settlement I am going to mention, matters stood thus: Dr. *Horlock* was tenant for life with a power to appoint among the children or remoter issue of his marriage; in default of appointment, the property—which was real estate—was to go to the children of the marriage—there were two—as tenants in common in fee.

13 Ch D 261

Miss *Horlock* being thus entitled, in default of appointment by her father, to one-half of the settled property, married Mr. *Sweetapple*, and being of age she and her intended husband entered into the following covenant with the trustees of their settlement:—[His Lordship read the covenant, and continued:—] The words are: "Now is . . . interested in or entitled to any real property." She certainly then was interested in or entitled to a ~~contingent~~ defeasible reversionary interest in real property under her father and mother's settlement. Moreover, the covenant is to settle upon trusts which shew at once the parties contemplated reversionary property, because it directs what is to be done with any interest which shall "fall into possession."

13 Ch D 261

Then Mr. *Sweetapple* died; and then, after his death, Mr. *Horlock*, the father, in exercise of his power, appointed by a deed-poll of the 26th of June, 1873, the whole of the real estate comprised in his settlement to his two children equally. So that Mrs. *Sweetapple* took under the appointment precisely the same estate as she would have taken in default of appointment, that is to say, she took one-half of the property as tenant in fee. Now is that comprised in the covenant or not? The words are: "In case the

(1) 10 L. T. (N.S.) 367; 4 N. R. 54.

said *Elizabeth Horlock* now is, or if at any time during the continuance of her said intended coverture, she the said *Elizabeth Horlock*, or the said *Thomas Sweetapple* in her right, shall . . . become seised of, or interested in, or entitled to any real or personal property," they will by effectual conveyances convey to the trustees. It is clear that that part of the covenant relating to the settlement of property to be acquired during the coverture does not affect the question, as the appointment was executed after the coverture. Therefore if this property is comprised in the covenant at all it is so under the words "Now is."

Now she was at the date of her settlement entitled to this one-half in reversion in default of appointment. Supposing she had immediately afterwards conveyed this interest, would that conveyance have passed what came to her subsequently by the appointment? I should have thought clearly not—apart from the authorities. A conveyance by a person by an innocent assurance of an interest expressed as being subject to be defeated by the exercise of a power, does not convey an interest which that person might take under the power. This is not like a settlement of all property which might come to the wife in any event, but only of that which was then vested in or belonging to her. Persons claiming under such a settlement cannot be in a better position than if the settlement covenanted to be executed had been executed the day after the marriage.

So it seems apart from the authorities, but as not unfrequently happens, I find myself embarrassed by the state of the authorities.

The first case we have is *In re Frowd's Settlement* (1), decided so long ago that there is great difficulty in dealing with it apart from other authorities.

There by a marriage settlement certain funds were settled upon trust for the children, grandchildren, and issue of the marriage as the survivor of the husband and wife should by will appoint, and in default of appointment, for the children of the marriage in equal shares. There was only one child of the marriage, a daughter, who married. The settlement made upon her marriage contained a covenant very like this, for the settlement of all the property vested in the lady at the date of her marriage, or

(1) 10 L. T. (N.S.) 367; 4 N. R. 54.

M. R. 1879 SWEETAPPLE v. HORLOCK.

to which she or her husband in her right might become entitled during the coverture. There was, as I have said, a power in the marriage settlement of the lady's father and mother—a power, as here, to appoint by will, so that by an exercise of that power a grandchild could take to the exclusion altogether of the lady herself.

Then by the marriage settlement of the lady she and her husband covenanted with their trustees that they would convey, assign, and assure to the trustees all the real and personal estate "then vested" in the lady, or which should become vested in her husband in her right, and all the real and personal estate which the wife or her husband in her right "during the said coverture might become entitled to under or by virtue of any gift, devise, or bequest, or by succession, or otherwise."

The words are not quite the same as those in the present case. Here the words are, "In case the said *Elizabeth Horlock* now is," or if at any time during the coverture, she or her husband in her right should become "seised of or interested in or entitled to any real or personal property." There the covenant was to convey all property "then vested." However, I cannot see any real difference: it is substantially the same thing. Then after the marriage there was an appointment to the lady absolutely, for her separate use, and the question was whether or not the appointed property passed by the covenant in the lady's settlement to settle what was "then vested" in her. It was argued that it did not pass because she took as appointee only, and not under the original settlement as one of the children in default of appointment. On the other side it was said that it was an interest under the settlement which created the power, though uncertain in amount until the power was exercised, and that argument was adopted by the Vice-Chancellor, who said that "Mrs. *Highett* was entitled, in default of appointment, to the whole fund, and that the appointment did not in any respect change her interest." That is rather a play upon words. It did not change her interest in point of amount, no doubt, but it did change her interest as an object of the settlement.

Then the Vice-Chancellor says, "Her share might have been altered in amount, but in fact the whole fund had been given to her. It would be far too great a refinement to say that distinctions, which might hold good in relation to real estate, were

to be introduced in dealing with a sum of money. The limitation to the separate use could make no difference. The covenant, too, was by the wife as well as by the husband. At the date of the settlement of 1851 something was actually vested in Mrs. *Highett* under the original settlement, though it was liable to be devested by an execution of the power. By the appointment which was made, nothing was taken from her; its only effect was to ascertain the share she took. He must therefore hold that this fund was subject to the covenant in question, and it must be paid to the trustees of the settlement of 1851."

Now one observation to make upon that judgment is that the Vice-Chancellor distinguishes the case before him from one relating to real estate, by saying that there were distinctions which might hold good as to real estate, but that they were not to be introduced in dealing with a sum of money: so that I may avail myself of that decision to say that *In re Frowd's Settlement* (1) does not bind me upon a question of real estate; and I will say further, that I should hold it not binding upon me upon a question of personal estate either, if I were at liberty to do so.

Then the point came before the Court of Appeal in *In re Vizard's Trusts* (2). There a fund was settled by will upon trust for a person for life, with remainder to all or such one or more of the children or issue of the testator's deceased brother, as the tenant for life should appoint, and in default of appointment to the children of the brother equally. One of the children, a son of the testator's brother, made a general assignment of all his property to a trustee for his creditors, under the *Bankruptcy Act*. After this the tenant for life appointed the fund by will to the children of the brother equally, the result being that the son took the same share under the appointment as he would have taken in default of appointment. It was held by Lord Justice *Turner*, affirming the decision of Vice-Chancellor *Stuart*, that the son's deed of assignment did not pass his after-acquired property: that his interest in default of appointment was defeated by the appointment which gave him an interest determinable by lapse, which did not happen, and that such interest must therefore be considered a new interest, and consequently did not pass to the trustee.

(1) 10 L. T. (N.S.) 367; 4 N. R. 54. (2) Law Rep. 1 Ch. 588.

M. R.
1879
SWEETAPPLE
v.
HORLOCK.

The Lord Justice says this (1): "It was insisted on the part of the Appellant (the trustee) that whatever *F. Vizard* (the son) took, he took under the will of the testator, and that the appointment did not displace or alter the interest which he took under the will in default of appointment, and which had passed to the Appellant by the deed, the power being, as it was said, a power of selection only. I think, however, that the power in this case was something more than a power of selection. It was a power to distribute, no less than to select, and it enabled an appointment to be made in favour of persons who would not take in default of appointment, and, certainly, I am not satisfied that the execution of the power of appointment was not of itself sufficient to defeat the limitations in default of appointment contained in the testator's will, but it is not, in my opinion, necessary to decide this point, for I think that the interest of *F. Vizard* was altered by the exercise of the power." Then the Lord Justice points out that, in the one case, under the will, the son took a fifth as a vested interest, and in the other case, under the power, he took a fifth contingently on his surviving the testator's widow, the tenant for life. So the Lord Justice clearly decided the question on the ground that the appointed share was different in quantum of interest from the contingent share, but he appears to doubt whether an appointment to the son of the same share as he would have taken in default of appointment would not also have given him a new interest. But it is difficult to see why, if the share appointed is something more or less than the share in default of appointment, it will pass as a new interest, whereas if it is the same it will not so pass. It is difficult to see why, if a fourth would pass, a fifth should not pass. With great respect to the learned Lord Justice it is a distinction without a difference.

The Lord Justice then decided, affirming the decision of Vice-Chancellor *Stuart*, though the Lord Justice *Knight Bruce* appeared to entertain a different opinion, that the appointed share did not pass by the assignment, inasmuch as the deed of appointment conferred a new interest.

That was also the view taken in *De Serre* v. *Clarke* (2) by the Vice-Chancellor *Malins*, who argued *In re Vizard's Trusts* (3). Now

(1) Law Rep. 1 Ch. 592. (2) Law Rep. 18 Eq. 587.
(3) Law Rep. 1 Ch. 588.

I must say I cannot agree with the observations of the learned Vice-Chancellor in *De Serre* v. *Clarke* (1) any more than with the observations of the Lord Justice *Turner* in *In re Vizard's Trusts* (2).

In *De Serre* v. *Clarke* the facts were these: A testator gave his residuary estate to trustees upon trust to pay the income to his daughter for life for her separate use, and after her death to pay the fund to the children of the daughter as she should by deed or will appoint, and in default of appointment amongst them equally. The daughter appointed by deed the whole of the fund amongst her children, giving the Plaintiff, who was one of them, a specified sum for her separate use absolutely. The Plaintiff, after the death of her grandfather, and before the date of the appointment by her mother, married a Frenchman domiciled in *France*. He died before the date of the appointment, and there was one child only of the marriage. There having been no settlement on the marriage, the question was whether, under the French law, the appointed fund fell into the community of goods as being property acquired during the marriage. The Vice-Chancellor held that a new title accrued to the Plaintiff under the appointment, and to that I entirely assent, but the judgment is, in my opinion, somewhat singular; because, after deciding in the way I have mentioned and saying that he felt himself bound by the decision of Vice-Chancellor *Stuart* in *Lee* v. *Olding* (3), which did not decide the exact point, he expresses some dissent from *In re Vizard's Trusts*, where certainly the precise point did arise.

After stating the facts in *Lee* v. *Olding* and *In re Vizard's Trusts* the Vice-Chancellor says: "Then the question is, whether I am at liberty to disregard these authorities, and to say that this lady had at the date of the marriage an interest in the property which she took under the appointment, and that what she so took is subject to the French code. I consider that on these grounds I am bound to come to the conclusion that she took under the appointment and not under the will." Up to that point I entirely assent to the Vice-Chancellor's judgment; but then he goes on: "Mr. *Pearson* pressed on me very strongly *In re Frowd's Settlement* (4), and I think there is much to be said in favour of it and

(1) Law Rep. 18 Eq. 587.
(2) Ibid. 1 Ch. 588.
(3) 25 L. J. (Ch.) 580; 2 Jur. (N.S.) 850.
(4) 10 L. T. (N.S.) 367; 4 N. R. 54.

M. R. 1879 SWEETAPPLE v. HORLOCK.

against *In re Vizard's Trusts* (1); and if I were at liberty to treat the question as still open, I am by no means prepared to say what view I should take. *In re Frowd's Settlement* (2) was decided before *In re Vizard's Trusts*, and though it does not appear from the report, I have no doubt that that case was commented upon by myself and Mr. *Pearson* in the arguments. But the facts of the two cases are not quite similar. *In re Frowd's Settlement* was a case of a covenant in a marriage settlement to settle all property then vested in the wife, and at the time of the marriage she was entitled, in default of appointment, to the funds settled by her father's marriage settlement, and those funds were afterwards appointed to her absolutely for her separate use, and the Vice-Chancellor *Wood* held that the appointment did not divest her interest in the fund, so as to take it out of the operation of the settlement. I am bound to say that, although my own opinion might coincide with that view, I consider that the law is settled the other way."

The result, therefore, is a most singular state of authority. First, there is a decision of Vice-Chancellor *Stuart* holding that the interest of the appointee was acquired under the appointment and not under the original settlement. Then there is a decision of Vice-Chancellor *Wood* distinctly holding that the appointment did not divest the interest under the settlement. Then there is a decision of the Court of Appeal, affirming a second decision of Vice-Chancellor *Stuart*, on the distinct ground that the appointment conferred a new interest. Then there is a decision of Vice-Chancellor *Malins* following the two decisions of Vice-Chancellor *Stuart*, not on principle, but because of the expression of opinion of Lord Justice *Turner*, though agreeing with the decision of Vice-Chancellor *Wood*.

It appears to me that, in that state of the authorities, I may say I am not compelled to decide that in the present case this appointed share is bound by the covenant; and apart from authority I am prepared to say I am entitled to come to the decision I do, namely, that the share is not bound by the covenant.

There will therefore be a declaration in the terms of the claim.

Solicitors: *W. H. Bennett*, agent for *E. Newman, Yeovil; E. Newman.*

(1) Law Rep. 1 Ch. 558. (2) 10 L. T. (N.S.) 367; 4 N. R. 54.

In re CRUMLIN VIADUCT WORKS COMPANY.

M. R.
1879
April 26.

Limited Company—Winding-up—Rules in Bankruptcy—Reputed Ownership—Judicature Act, 1875, s. 10.

The bankruptcy rules as to reputed ownership are not to be applied under sect. 10 of the *Judicature Act*, 1875, in the winding-up of a limited company.

ADJOURNED SUMMONS.

The *Crumlin Viaduct Works Company, Limited*, was incorporated in 1871, for the purpose of purchasing the *Crumlin Viaduct Works*.

By the articles of association the directors were empowered to borrow on mortgage of any of the property of the company, and in exercise of this power the directors borrowed a sum of £5000 on the security of an equitable mortgage of the lease of the works. They subsequently raised a further sum of £12,000 by debentures which purported to charge the undertaking, lands, property and effects of the company, both present and future, with the debenture debt, subject only to the prior equitable mortgage. The debentures were not registered as bills of sale.

On the 12th of January, 1878, the company was ordered to be wound up compulsorily, and shortly afterwards the liquidator took possession of the company's works and unfixed stock-in-trade, machinery, and plant.

Under an order made in the winding-up the works and also the unfixed stock-in-trade, machinery, and plant were put up for sale by the liquidator, when the works themselves were purchased by the equitable mortgagee. The unfixed chattels were also sold, and realized the sum of £1521 8*s.* 5*d.*, which was received by the liquidator.

The question was whether this money belonged to the debenture holders under their security, or was available for the general body of creditors.

The question was raised by a summons taken out by the liquidator claiming that the money might be carried to the general account of the liquidation for the benefit of the general creditors.

M. R.

1879

In re CRUMLIN VIADUCT WORKS COMPANY.

Roxburgh, Q.C., and *Romer*, for the liquidator:—

After the decision in *In re Marine Mansions Company* (1), which has always been followed, we admit we cannot now argue that the non-registration of the debentures under the *Bills of Sale Act* rendered them void as to the unfixed chattels, but what we contend is that, the chattels being in the reputed ownership of the company at the date of the winding-up, the ordinary rule in bankruptcy that property in the reputed ownership of the bankrupt passes to the trustee (*Bankruptcy Act*, 1869, s. 15), applies, under sect. 10 of the *Judicature Act*, 1875, to the case of a company in liquidation, and consequently that in the present case these chattels vested in the liquidator for the benefit of the creditors in general. We ask your Lordship, therefore, now to apply this bankruptcy rule just as you applied another rule in *In re Printing and Numerical Registering Company* (2). In *In re Stockton Iron Furnace Company* (3), Vice-Chancellor *Bacon* distinctly held that under this section the bankruptcy rule of reputed ownership was applicable to the case of a company in liquidation. It is true that on appeal the Vice-Chancellor's decision was reversed, but not on that point.

It would seem that these debenture holders are in the position of mere bondholders and not mortgagees: *Norton* v. *Florence Land and Public Works Company* (4).

[JESSEL, M.R., mentioned *Ex parte Wingfield* (5).]

Chitty, Q.C., and *Woodroffe*, for the debenture holders, were not called upon.

JESSEL, M.R.:—

If the decision of Vice-Chancellor *Bacon* on this point had been reversed (I am afraid the Appeal Court, though it did not decide the point, was not very favourable to the Vice-Chancellor's view), it would have been of course not difficult to decide this case. But doing the best I can with this very difficult section, I must say that it appears to me tolerably clear that the rules as to order

(1) Law Rep. 4 Eq. 601.
(2) 8 Ch. D. 535.
(3) 10 Ch. D. 335.
(4) 7 Ch. D. 332.
(5) 10 Ch. D. 591.

and disposition were never intended to be applied in the way contended for.

Let us consider for a moment what those rules are. They are simply this, that the estate to be administered in the bankruptcy is to include, as part of the bankrupt's estate, certain property which does not belong to him. It is property which really belongs to other people which is reputed to belong to the bankrupt, or, as it is generally put, which is in the reputed ownership of the bankrupt. That is the rule as to order and disposition in bankruptcy.

Then there came a question as to what was the meaning of "property of which the bankrupt was reputed owner," and it was held that he might be reputed owner, not only of property which never belonged to him at all, which he never had any real interest in at all, but also of property of which he was, so to say, mortgagor or owner of the equity of redemption—it was immaterial whether he himself gave the mortgage or not—but of which the legal title was in somebody else subject to redemption. That was within the rule. It was to be distributed under the bankruptcy free from the mortgage if the person legally entitled to the property subject to redemption consented to his acting as reputed owner. That is the rule in bankruptcy.

That being so, it is not a rule affecting the rights of creditors of the bankrupt at all. It affects the rights of true owners of property, which property is in the reputed ownership of the bankrupt. It is quite immaterial whether the true owner is or is not a creditor of the bankrupt: the rule applies all the same. He may never have been a creditor of the bankrupt. He may be simply an absolute owner of the property, or he may be a mortgagee of the property, from an owner previous to the bankrupt, or be a creditor of the previous owner from whom the bankrupt may have purchased what in real estate is called the equity of redemption, and what in chattels would be called the ownership of the chattels subject to the pledge; or he may be a person who has lent money to the bankrupt and taken a mortgage from him. In the last case he may either be a creditor of the bankrupt, or he may not be a creditor; he may have a debt barred by statute, or otherwise,

M. R. 1879 *In re* Crumlin Viaduct Works Company.

so as no longer to be creditor, but still be the mortgagee or pledgee of the property.

The rule is, therefore, strictly a rule of ownership, and not a rule which affects either secured or unsecured creditors of the bankrupt, though, of course, in the case I have mentioned, if the pledgee happened to be a creditor he remains a creditor just as he would have been if he had never had a pledge or hypothecation of the chattel.

That being the nature of the rule, we have to deal with the following words of the 10th section of the *Judicature Act*, "In the winding-up of any company . . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

Now, there being in bankruptcy a number of rules relating specifically to the rights of secured and unsecured creditors, and a number of rules as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities, it would be extraordinary to suppose that, having used these words in this Act of Parliament, the Legislature intended to apply the rules as to order and disposition. "Why did not they say so?" would be the first observation if they intended to include the rules as to reputed ownership or the rules as to order and disposition.

But there is another reason why it could not have been intended by this Act to include these rules, which, to my mind, is conclusive, and that is the utter absurdity of such a result. It cannot be pretended that under these words the rules as to reputed ownership apply where a man is not a creditor at all, and has no debt or liability provable: he is neither a secured nor an unsecured creditor. Therefore, if he allows a company to remain reputed owners of the goods, he does not lose the goods if he is absolute owner or even if he is mortgagee or pledgee, provided he is not a creditor, but according to this argument he is to lose the

goods if he is a creditor. I must say a more absurd conclusion cannot well be presented to the mind. I cannot myself attribute so absurd a result to modern legislation as that argument would bring me to.

M. R. 1879 *In re* Crumlin Viaduct Works Company.

Therefore I decide that the rules as to reputed ownership do not in this case extend to deprive the debenture holders of their security.

Solicitors: *Lawrance, Plews, & Baker; Robinson, Preston, & Stow.*

AMBROISE *v.* EVELYN.

M. R. 1879 *May* 9

[1878 A. 77.]

Practice—Close of Pleadings—Plaintiff's Delay in delivering Reply—Motion by one Defendant to dismiss for want of Prosecution—Delivery of last of Defences—Enlargement of Time to other Defendants—Enlargement by Consent—Order unnecessary—Rules of Court, 1875, *Order* XXII., *r.* 1; XXIV., *r.* 1; XXIX., *r.* 12; XXXVI., *rr.* 4, 4*a*.

Where one of several Defendants in an action has delivered his defence, and the time for the Plaintiff to deliver his reply to such defence has expired, but the Plaintiff has, without the knowledge of that Defendant, agreed in writing with the other Defendants to extend the time for delivering their defences, that Defendant cannot move to dismiss the action as against him for want of prosecution, the pleadings not yet being closed within the meaning of Order XXIX., rule 12, and Order XXXVI., rules 4, 4a, of the Rules of Court, 1875. A Defendant's proper course under such circumstances is to write to the Plaintiff's solicitor, and inquire how the action stands as regards the other Defendants.

If a Plaintiff consents in writing to grant a Defendant an extension of time for the delivery of his defence under Order XXII., rule 1, an order for the purpose is unnecessary.

46 B.D. 403.

THIS was a motion by the first three of the five Defendants in this action to dismiss the action as against them for want of prosecution, on the ground that the time for the Plaintiff to deliver his reply and give notice of trial had expired.

The writ was issued on the 3rd of June, 1878; the statement of claim was delivered on the 14th of December, 1878, and the now moving Defendants delivered their joint statement of defence on the 21st of February, 1879. Their interests in the action differed

M. R. 1879 — AMBROISE v. EVELYN.

from those of the other Defendants, who were, moreover, represented by separate solicitors.

No step had been taken in the action by the Plaintiff since the 21st of February, 1879.

The time fixed by the Rules for the delivery of the defences by the two last Defendants having expired, the solicitor to the now moving Defendants ascertained from the Chief Clerk that an extension of time had not been granted, and that the other Defendants had not made any application for the purpose. It, however, turned out that the Plaintiff had, without the knowledge of the moving Defendants, consented in writing to grant one of the two other Defendants an extension of time, which had not yet expired. No statement of claim had been delivered to the remaining Defendant, he being merely in the position of a stakeholder.

Prior to the service of the notice of motion to dismiss, the moving Defendants had not made any communication to the Plaintiff's solicitor with reference to the motion.

Bardswell, for the motion:—

According to Rules of Court, 1875, Order XXII., rule 1, the time for delivering a defence can only be extended "by the Court or a Judge," not, as has been done here, by the Plaintiff's solicitor. Therefore time must be reckoned against the Plaintiff from the delivery of our defence, which was on the 21st of February. That being so, the time for the Plaintiff to deliver his reply under Order XXIV., rule 1, expired on the 14th of March, whereupon the pleadings were closed, and the time to give notice of trial under Order XXXVI., rule 4, expired on the 25th of April. We are therefore entitled to move to dismiss under Order XXXVI., rule 4a.

Speed, for the Plaintiff:—

I submit that the time for delivery of a defence may be extended by the Plaintiff, and that it is unnecessary to incur the expense of a special order for the purpose. If that is so, then the time has not yet arrived for the Plaintiff to deliver his reply, the last of the defences not yet having been delivered within the meaning of Order XXIV., rule 1. If the moving Defendants had applied to us

in the first instance, we could have informed them of the state of the action, and this motion might then have been avoided.

Bardswell, in reply.

JESSEL, M.R.:—

The point is certainly a difficult one. It is a remarkable thing that in ordinary cases, where there are several Defendants, the Plaintiff may give time to any of them for the delivery of their defences, and an order may even be drawn up for such purpose, yet there is no prescribed mode by which the others can ascertain the fact that an extension of time has been granted, because the Chief Clerks are not bound to inform the parties that any such order has been made. If the time has been extended under an order, it is clear the Defendants who have delivered their defences cannot move to dismiss the action for want of prosecution; for though the time, as regards them, for the delivery of the Plaintiff's reply, may have expired, it has not done so in the case of the Defendant who has had his time extended. But the question is, what ought to be done where the time has been extended by the Plaintiff's consent and without an order. It appears to me that in such a case, before moving to dismiss, the right course is that which prevailed under the old practice, namely, to write to the Plaintiff's solicitor and ask him what is the state of the pleadings in the action and what he is going to do. Under the old practice, a man used sometimes to have what were called pocket Defendants, to whom he could give time for the putting in of their answers, and so postpone the further proceedings indefinitely; but in all such cases the regular practice was for the real Defendant to write to the Plaintiff's solicitor and ask him in what state the cause was, and if he did that, the Defendant generally was informed, as the solicitor was bound to give the information.

That seems to me to be the proper course now: you should write to the Plaintiff's solicitor and ask him if he is going on, and how the pleadings stand. You can then find out whether the Plaintiff is in default.

The singularity of the present case is that the Plaintiff has been guilty of a technical irregularity. Order XXII., rule 1, pro-

M. R. 1879 AMBROISE v. EVELYN.

vides that the time for delivering the defence may be extended "by the Court or a Judge." Now here no order was obtained, but the Plaintiff wrote to one of the Defendants that he would give further time. That is, strictly speaking, irregular. If you look at Order XXIX., rule 12, you will find that if the Plaintiff does not deliver a reply within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period;" and Order XXIV., rule 1, says that the Plaintiff shall deliver his reply within three weeks after "the defence or the last of the defences shall have been delivered." That must mean after the delivery of the last of the defences which could be put in legally, that is, according to the rules.

Now here the only defence legally put in was that of the moving Defendants, so that the result is that the pleadings are closed as against the other two Defendants also, and therefore the rules, if read in their strict technicality, may warrant this motion under Order XXXVI., rule 4a. But it would be very inconvenient to allow such a motion, which would only increase costs without serving any useful object. Why should not the Plaintiff be able to consent to an extension of time, without any order at all? It seems irrational to have an order drawn up for no purpose in the world but to enlarge the time for the Defendant to deliver his defence, when that can be just as well done by the Plaintiff's consent. I am certainly adverse to laying down a rule requiring that an order should be drawn up, when it can serve no useful purpose, and can only increase expense. The ordinary practice in Chambers is for the Defendant to arrange with the Plaintiff if he wants to have the time enlarged for delivering his defence, and it appears to me the consent of the Plaintiff's solicitor to an enlargement of the time ought to be quite sufficient. I should, in my opinion, be straining technicality beyond fair limits if I were to say that a defence could not be delivered after the time specified in the rules without an order of the Court or a Judge.

The result is that, in my opinion, the defences of the two last Defendants are defences which can still be legally put in, and therefore the pleadings cannot be considered as closed; consequently the Plaintiff is still in time and this motion fails.

As, however, there has been some irregularity on the Plaintiff's

part, though at the same time I am anxious to avoid laying down a rule which can only have the effect of increasing costs, I will make no order on the motion except that the costs of all parties be costs in the action.

M. R. 1879 AMBROISE v. EVELYN.

Solicitors: *W. H. Bennett; Mozley & Steavenson.*

MULLINS *v.* HOWELL.

M. R. 1879 *June* 20

[1879 M. 27.]

Motion—Order by Consent—Undertaking by Defendant—Mistake on one Side only.

The Court has jurisdiction to discharge an order made on an interlocutory application by consent when it is proved to have been made under a mistake, though that mistake was on one side only.

Where on motion for a mandatory injunction an order was made by consent pursuant to the terms of a previous agreement by which the Defendant gave an undertaking to remove certain obstructions, and it appeared that the Defendant had by mistake consented to a more extensive undertaking than he intended to do, the Court refused to enforce that part of the undertaking which had been given by mistake.

THE Defendant in this case was lessee of a building, or warehouse, in *Playhouse Yard, Golden Lane,* with an archway which he had erected under it in the year 1874. Through this archway the Plaintiffs claimed to be entitled to a right of way sixteen feet high and sixteen feet wide under a grant by the Defendant. The road under the archway was the means of access to a warehouse belonging to the Plaintiffs, at No. 3, *Nicolls Buildings.*

In January, 1879, the Defendant began to erect a story over the archway, and thus to reduce its height to less than sixteen feet, whereupon the Plaintiffs called upon him at once to stop the alteration and to restore the archway to its original height, alleging that the proposed alteration would cause a serious obstruction to their right of way.

A correspondence ensued between the parties relating solely to the height of the arch, and on the 25th of January, 1879, the

M. R. 1879 MULLINS v. HOWELL.

Plaintiffs issued a writ against the Defendant, claiming, by the indorsement, "First, an injunction to restrain the Defendant from obstructing any part of the right of way of the Plaintiffs, sixteen feet high and sixteen feet wide, for horses, carts, and waggons, from *Playhouse Yard* to their warehouse, No. 3, *Nicolls Buildings*, through the archway and passage under the Defendant's warehouse, and from allowing the girders, beams, and other obstructions, works, and things placed in the said archway and passage, or any part thereof, including the projecting buttresses or sides of the entrance arches to the said passage, to continue therein; Secondly, an order on the Defendant to pull down and remove the said girders, beams, obstructions, and works, and also to cut away and remove the aforesaid projecting buttresses or sides of the entrance arches, and to put the archway and passage into such a condition in all respects that the Plaintiffs may be able to enjoy such right of way of the width and height aforesaid without impediment or obstruction."

A notice of motion for an injunction in the terms of the indorsement was served with the writ on the Defendant, whereupon the parties met several times with a view to an arrangement, and the result was that the Defendant, on the 29th of January, 1879, signed the following memorandum of agreement: "It is agreed that the motion in this cause shall be brought on on Friday next, and that, the Defendant by his counsel giving an undertaking in the terms of the notice of motion to give the Plaintiffs the right of way of sixteen feet high and sixteen feet wide, as claimed by the notice of motion, in manner following—the height to be taken in front of the gateway from the present roadway 15 ft. 3 in., by lowering the roadway 9 inches, little more or less, as the level of the road with the main road in the front will permit—Defendant to pay the costs, and thereupon all further proceedings to be stayed."

On the 1st of February, 1879, the motion came on, and an order was made in the following terms: "The Defendant by his counsel undertaking to give to the Plaintiffs a right of way sixteen feet high and sixteen feet wide for horses, carts, and waggons, laden and unladen, leading from *Playhouse Yard, Golden Lane,* to their warehouse, No. 3, *Nicolls Buildings,* through the archway

and passage under the Defendant's warehouse in *Playhouse Yard*, in manner following (that is to say), the height to be taken in the front of the gateway from the present roadway 15 ft. 4 in. and by lowering the roadway eight inches, little more or less as the level of the roadway with the main road will permit, and also undertaking not to allow the girders, beams, and other obstructions, works, and things placed in the said archway and passage, or any part thereof, including the projecting buttresses or sides of the entrance arches to the said passage to continue therein, into such a condition in all respects that the Plaintiffs may be able to use and enjoy such right of way of the width and height aforesaid without impediment or obstruction, it is by consent ordered that the Defendant *David Howell* do pay to the Plaintiffs the costs of this action, and that all further proceedings in this action be stayed except for the purpose of giving effect to this order."

The Defendant proceeded to comply with the undertaking except so far as it related to the removing of the projecting buttresses or sides of the archway. After the order was drawn up the Defendant found, as he alleged, that the undertaking went further than he intended or was aware of, inasmuch as he never intended to remove the projecting buttresses or sides of the archway which had formed part of the erection for several years. In support of his view he referred in his affidavits to the letters of the Plaintiffs and to his interviews with him as shewing that the removal of the buttresses was not in the contemplation of the parties, and he further stated that the ground landlord under whom he held the property would not permit such removal to take place.

The Defendant now moved that so much of the order of the 1st of February, 1879, as related to the removing of the projecting buttresses might be discharged, the same having been consented to by mistake and inadvertence induced by the Plaintiffs' letters.

The Plaintiffs also moved that the Defendant might be ordered to perform his undertaking in the order of the 1st of February, 1879, to remove or alter the said projecting buttresses and to put the same into such condition that the Plaintiffs might be able to enjoy their right of way.

The two motions came on together.

M. R. 1879

MULLINS v. HOWELL.

Chitty, Q.C., and *Jason Smith*, in support of the Defendant's motion:—

The undertaking which the Plaintiffs seek now to enforce, and on which the order was made by consent, was given by the Defendant under a mistake so far as related to the removal of the buttresses. It is clear from the evidence and correspondence that the Defendant did not intend his undertaking to extend to removing the buttresses, which indeed he had no power to do under his lease. Where a consent order has been made, or a compromise agreed to under a mistake on the part of one of the parties, the Court has jurisdiction to set it aside: *Cannan* v. *Reynolds* (1); *Cooke* v. *Greves* (2); *Gilbert* v. *Endean* (3).

[They also referred to *Swinfen* v. *Swinfen* (4).]

Davey, Q.C., and *Stock*, in support of the Plaintiffs' motion.

JESSEL, M.R.:—

I think that there is no case for discharging the former order, but I do not think I ought to attach the Defendant.

I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the Court having a sort of general control over orders made on interlocutory applications.

I also consider that the Court has a discretion as to enforcing an undertaking by attachment, that is, by sending the person to prison.

I do not think that the rules which have been laid down as the rules under which the Court will enforce agreements apply to enforcing orders of the Court, because the Court has jurisdiction over its own orders, and there is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments.

Here there is not only an undertaking but an agreement to which the rules of equity would apply; so, being satisfied that the Defendant made a mistake, I should not, following the rule in

(1) 5 E. & B. 301.
(2) 30 Beav. 378.
(3) 9 Ch. D. 259.
(4) 1 C. B. (N.S.) 364; 2 De G. & J. 381.

equity, enforce the agreement as against him, and *à fortiori* I should not enforce the undertaking against him. At the same time I am satisfied that the Plaintiffs were not to blame; the only person to blame being the Defendant himself. Still, as it is clear that he never intended to give the undertaking in this form, and seeing that there is an agreement as well as an undertaking, the Plaintiffs ought to have an opportunity of deciding whether they will take the rest of the order which the Defendant intended to agree to. In any event, the Defendant's application being for indulgence, and the Plaintiffs' for the enforcement of a legal right, the Defendant must pay the costs of both motions.

The Plaintiffs' counsel having elected to take the rest of the order to which the Defendant had intended to consent, an order was made to the following effect:—

The Court being of opinion that the Defendant's undertaking, so far as it related to the removing of the buttresses, was entered into under a mistake on his part, there will be no order except that the Defendant pay the costs of both motions.

Solicitors: *J. Raven & Co.; Plunkett & Leader.*

FRY, J.
1879
April 25.

In re WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK.

Ex parte SWANSEA FRIENDLY SOCIETY.

Friendly Society—Treasurer—Corporation—38 & 39 *Vict. c.* 60, *s.* 15, *sub-s.* 7.

An incorporated banking company cannot be the treasurer of a friendly society within the meaning of the *Friendly Societies Act*, 1875.

THE *Swansea Friendly Society* was established in 1867, and was duly registered under the *Friendly Societies Act*, 1875. The rules of the society provided that in the event of any vacancy occurring by the resignation or death of any officer, or in the event of his removal, the committee of management should elect a successor until the next annual meeting, when his appointment should be confirmed or another person elected in his place. The rules further provided for security being given by the officer of the society, and for the attendance of the treasurer at meetings of the committee and of the society. A former treasurer appeared to have been in default, and at a meeting of the committee of management of the *Friendly Society*, held on the 18th of June, 1877, a resolution was passed that the *West of England and South Wales District Bank* should be the treasurer of the society. Three of the committee then called on *J. S. Morgan*, the manager of the bank, who on behalf of the bank accepted the office of treasurer. An account was then opened by the society with the bank, and on the 9th of December, 1878, when an order was made for winding up the bank, the money of the society in the bank was £496 11*s.* 9*d.*

A summons was taken out by the trustees of the *Friendly Society* for payment to them of this sum as in the possession of the bank as treasurer of the society. It was stated at the bar that the bank was a corporation under the *Joint Stock Companies Act*.

Bristowe, Q.C., and *Buckley*, in support of the summons:—

Under the *Friendly Societies Act*, 1875 (1), a friendly society is

(1) 38 & 39 Vict. c. 60, s. 15, sub-s. 7: "Upon the death or bankruptcy or insolvency of any officer of a society having in his possession by

entitled to receive any money in the hands of any officer of the society at once and in priority to other creditors. Here the bank was the treasurer and had this sum.

[FRY, J.:—This bank was either a partnership or a corporation. Can either be an officer within the words of the Act?]

Under 13 & 14 Vict. c. 21, s. 4, words in the singular include the plural. Moreover, the Act mentions liquidation. Why should a joint stock bank not be treasurer? In *Ex parte Harris* (1) a proper appointment had not been made. The expressions in *Ex parte Ross* (2) are merely *obiter dicta*.

Glasse, Q.C., and *Romer*, for the liquidator of the bank, were not called upon.

FRY, J.:—

I am of opinion that the claimants in this case wholly fail to establish their claim. They claim that a sum of £489 11*s*. 9*d*., which is standing to the credit of their account with the *West of England Bank*, should be paid to them in priority to any other creditor by virtue of the provision contained in the *Friendly Societies Act*, which follows similar provisions contained in similar Acts for a long series of years. The *West of England Bank* appears from the statement of counsel to be a company incorporated under the Companies Acts of 1862 and 1867, and is therefore a corporation. It appears that before the 18th of June, 1877, a

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virtue of his office any money or property belonging to the society, or if any execution, attachment, or other process be issued, or action or diligence raised against such officer, or against his property, his heirs, executors, or administrators, or trustee in bankruptcy or insolvency, or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall, upon demand in writing of the trustees of the society, or any two of them, or any person authorized by the society, or by the committee of management of the same, to make such demand, pay such money and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer.

Bankruptcy or insolvency in the present section includes liquidation of a debtor's affairs by arrangement in *England cessio bonorum*, of a debtor in *Scotland*, and a petition for arrangement with creditors in *Ireland*; and a trustee in bankruptcy or insolvency includes an assignee in *Ireland* and a judicial factor in *Scotland*.

(1) De G. 162.

(2) 6 Ves. 802.

FRY. J.
1879
In re WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK.
Ex parte SWANSEA FRIENDLY SOCIETY.

treasurer of this society had been appointed, and that defalcations had been made by him, and that at a meeting of the committee the bank was appointed the treasurer of the society. Now, the rules of the society provide that in the event of any vacancy occurring by resignation or death of any officer, or in the event of removal, the committee of management shall elect a successor until the next annual meeting of the members of the society, when his appointment shall be confirmed or another person elected in his place. On the 21st of May, 1878, a general annual meeting of the society was held, and it does not appear that at that meeting the appointment of the bank was confirmed, or any other person appointed treasurer. A question might therefore arise whether the Court is to imply that the office is to continue. I should have a difficulty in coming judicially to the conclusion that it was necessarily so. But another of the rules provides that the treasurer shall give security, but it appears that security has never been given, and there may be from the case of *Ex parte Ross* (1), before Lord *Eldon*, considerable doubt whether a person who has been appointed to the office of treasurer, and has not given the security which the Acts require, is a person against whom the society can make a claim to have the benefit of a preferential right.

But further than that, the question arises whether a corporation can fill the office of treasurer according to the rules of this society. It is evident that the treasurer is intended to perform certain personal duties. He is to attend the meetings of the members and the meetings of the committee. It is said that that may be done by a manager or clerk, but it appears to me that the scope and intent of these rules, with regard to officers, is the appointment of natural persons who are to be officers of the society within the ordinary meaning of the word, and that great difficulties are involved in the performance of the duties of an officer by a corporation instead of a natural officer. And when I turn to the clause of the existing Act regulating these societies and giving the preferential right on which the claimants are now insisting, I find similar words, indicating to my mind a similar intention that the officer against whom and against whose estate a pre-

(1) 6 Ves. 802.

ferential right is to be enforced is to be a natural person and not a corporation. [His Lordship read sub-sect. 7.] Now the whole scope of that clause appears to me to refer to a private individual who takes on himself an office, and it gives certain rights in the event of his death, his bankruptcy or insolvency, for execution, attachment, or process against his property or himself, and it is very remarkable that if it were in the mind of the Legislature that an incorporated company could be the officer, and that priority should be given in the case of a winding-up, this Act, which was passed long subsequently to any of the Winding-up Acts, is entirely silent with respect to the liquidation of the company, or the winding-up and distribution of the assets of the company. It appears to me that I am bound to read this clause somewhat strictly, and for the reason pointed out by Lord *Eldon* in *Ex parte Ross* (1), and by the Lord Justice *Knight Bruce*, when Chief Judge in Bankruptcy, in *Ex parte Harris* (2): the right given is one against the common rights of Her Majesty's subjects, and therefore those who claim that right must bring themselves within the express provisions of the statute. The only words which can be relied on here are those which mention process against the property of the debtor. It is said that those words include liquidation. It appears to me to be a very doubtful proposition; but I decide against the applicant, because I think that the Legislature has considered the officer against whom and against whose estate the benefit is given, as a private person and not as a corporation.

For these reasons, to which I must add that it appears very doubtful whether the manager had any authority on behalf of the bank to accept the office of treasurer so as to bind the bank, although, undoubtedly, the bank might become the bankers of the society, I must reject the claim made before me, and I must reject it with costs.

Solicitors for Friendly Society: *Tamplin & Co.*, agents for *Strick & Bellingham, Swansea.*

Solicitors for *West of England Bank: Clarke, Woodcock, & Ryland.*

(1) 6 Ves. 802. (2) De G. 162.

FRY, J.
1879
April 25

In re WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK.

Ex parte DALE & CO.

Agent—Bank—Following Money—Priority.

A banking company were employed as agents to collect money and to remit it to their employers. The bank received the money in cash, placed it with the other cash of the bank, and informed their employers that the money had been remitted; but before the money was actually remitted the bank went into liquidation:—

Held, that the money was part of the general assets of the bank, and that the employers of the bank were not entitled to be paid in priority to the other creditors.

Pennell v. *Deffell* (1) considered.

MESSRS. *DALE & CO.* were bankers at *South Shields.* They had no account with the *West of England and South Wales District Bank,* but were in the habit of employing that bank as special agents to collect money for them. On the 5th of December, 1878, *Dale & Co.*, having eight sums of money to receive at *Cardiff* on what were called average orders, sent the eight average orders to the *Cardiff* branch of the *West of England Bank,* with directions to collect the money and pay it when received to the account of *Dale & Co.* with *Glyn & Co.*, of *London,* who were agents for both the banks. The *West of England Bank* collected the sums due on six of these average orders, amounting to £247 7*s.* 7*d.* (which was received by a cheque on another bank for £172 10*s.* and by cash £74 17*s.* 7*d.*), and on the 7th of December wrote to *Dale & Co.* that the amount had been remitted to *Glyn & Co.* This, however, had not been done, and the *West of England Bank* ceased to carry on business after the 7th of December. The 8th of December was Sunday, and on the 9th of December the bank went into liquidation. The two uncollected average orders were returned to *Dale & Co.*, and *Dale & Co.* took out a summons in the liquidation for payment of the £247 17*s.* 7*d.* as having been received by the *West of England Bank* for a specific purpose, and not forming part of the assets of the bank. It

(1) 4 D. M. & G. 372.

appeared that the cheque for £172 10*s.* remained in the bank at the time of the liquidation, and during the argument the liquidators submitted to pay that sum to *Dale & Co.* The only question, therefore, was as to the £74 17*s.* 7*d.* cash, which had been mixed with the general cash of the *Cardiff* branch of the *West of England Bank.*

Higgins, Q.C., and *Everitt*, for *Dale & Co.*:—

The duty of the bank was to receive this money and at once to send it on to *Glyn & Co.* for *Dale & Co.* It ought not to have gone into their general account. *Dale & Co.* could have followed the clerk who received it and have taken it from him. They had no banking account with the *West of England Bank*, who were merely employed to collect this money: *Taylor* v. *Plumer* (1); *Ex parte Cooke* (2). The money was never in the order and disposition of the bank.

[FRY, J., referred to *Whitecomb* v. *Jacob* (3).]

If the bank has improperly mixed this money with other money it can be followed and claimed: *Brown* v. *Adams* (4); *Middleton* v. *Pollock* (5); *Birt* v. *Burt* (6); *Pennell* v. *Deffell* (7); *Frith* v. *Cartland* (8).

(1) 3 M. & S. 562.
(2) 4 Ch. D. 123.
(3) 1 Salk. 161.
(4) Law Rep. 4 Ch. 764.
(5) 4 Ch. D. 49.
(6) V.-C. M., May 30, 1877.

BIRT *v.* BURT.

THE trustees of the will of Lord *Southampton* had employed one *Birt* as agent in the sale of Lord *Southampton's* estates. On some of the sales *Birt* had received the purchase-moneys, and had paid them to his own account with his bankers, Messrs. *Drummonds*. *Birt* was dead, and the whole amount standing to his credit with Messrs. *Drummonds* had been paid into Court in an action for the administration of his estate. The trustees of Lord *Southampton's* will presented a petition for the transfer of the money in Court to a suit which had been instituted for the administration of Lord *Southampton's* estate.

The petition was heard before Vice-Chancellor *Malins* on the 13th of April, 1877.

Robinson, Q.C., and *Vaughan Hawkins*, in support of the petition:—

Birt acted as agent of the trustees in the sale of the estates of Lord *Southampton*, and the trustees are entitled to follow the sums which he had paid to his own account at his

(7) 4 D. M. & G. 372. (8) 2 H. & M. 417.

FRY, J.

1879

In re WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK. *Ex parte* DALE & CO.

Glasse, Q.C., and *Romer*, for the liquidators :—

The only question is, whether this money belongs to the general body of creditors or to this particular creditor. Was it the duty of the bank to keep this money separate, or merely to receive it and remit it, perhaps with other money, to *Glyn & Co.*, who were agents for both banks? They could not send on the particular coin received, and what were they to do with it? There was no wrongful act in mixing it with their other money. In no case has any one creditor been paid out of the mixed fund unless the mixing was unlawful: *Middleton* v. *Pollock* (1). In *Birt* v. *Burt* the money was traced.

Higgins, in reply.

FRY, J., after stating the facts of the case, continued :—

It appears to me clear that the bank, in the collection of these average orders, was a special agent of the claimants, and stood in what has often been called a fiduciary relation towards them. It appears further clear that if the money which they had so

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bankers and which ought to have been paid to the account of the trustees.

Higgins, Q.C., and *Bleby*, for *Birt's* representatives, submitted that there could be no segregation of a banking account; that *Birt* acted more as a banker than an agent; and that an account between the parties ought to be taken including matters which had occurred before Lord *Southampton's* death from which a set-off could be shewn.

MALINS, V.C., said that as *Birt* had acted in the capacity of agent for the trustees in the sale of Lord *Southampton's* estate, it was his duty to pay the money he received to the account of the trustees, instead of which he had paid it into his own banking account. The sums he had paid in answered in almost every instance to the amount he had received on each particular occasion. He had no right to set off any debt due from Lord *Southampton* in case there had been any, which was extremely doubtful; and if there was not any debt due from the trustees he had no right to commit a breach of trust in retaining this money. The trustees were entitled to follow the amount, and to have it paid over, as prayed, to the account of the administration suit.

Birt's representatives appealed.

1877. May 30. The Court of Appeal (*Jessel*, M.R., *Coleridge*, C.J., and *Baggallay*, L.J.) considered the case too clear for argument, and dismissed the appeal with costs.

Solicitors: *Ingle, Cooper, & Holmes; Farrer, Ouvry, & Co.*

(1) 4 Ch. D. 49.

received under their special agency had been kept separate from all the other moneys in the bank, or if it had been invested rightfully or wrongfully in some property into which the specific money could be traced without any mixture having taken place, then in either of those two cases Messrs. *Dale & Co.* could follow the money or the property into which the money had gone. In fact it has been very fairly and properly admitted by the learned counsel for the bank that one of those principles does govern the case of the cheque; that the cheque was at the time of the liquidation specific property resulting from the special agency, and, as such, belonged to the principals.

The question arises, however, with regard to the money received under the agency and mingled with the money of the agent, that is to say, the £74 17*s.* 7*d.* cash. It appears to me that there is a long line of authorities which regulate this case, and to which I must pay the greatest attention. Before referring to them let me observe that, in my opinion, the agent receiving these average orders was bound to convert them, so to speak, into money, that is to say, was bound to receive the money for which the orders were given, and that he might with propriety place the money in his till, provided he directed his agents in *London* to credit the account of Messrs. *Dale & Co.* in *London* with the amount so received.

That being the duty of the agent, I now turn to the authorities, and I find that so long ago as the 9th year of Queen *Anne* the case of *Whitecomb* v. *Jacob* (1) was determined in these terms: "If one employs a factor and entrusts him with the disposal of merchandise, and the factor receives the money and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods and remains unpaid, those goods shall be taken as part of the merchant's estate and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, &c.; for in regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor." Now, with the single exception that it appears to have been held subsequently that money may be so far ear-

(1) 1 Salk. 161.

FRY, J.
1879.
In re WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK.
Ex parte DALE & CO.

marked that it may be followed if it has been kept separate, that case appears to have been always held to be an authority. Therefore it comes to this, that if a factor properly converts goods into money, and that money gets mixed with his own money, that money cannot be followed by the principal.

In the celebrated case of *Ryall* v. *Rolle* (1) Mr. Justice *Burnet*, in delivering judgment, says (2): "Suppose goods are consigned to a factor who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods these goods will not be subject to the bankruptcy." In another case of *Ex parte Dumas* (3), before Lord *Hardwicke*, the petitioners were certain persons who had claimed bills arising from the produce of certain goods transmitted to them, and the Lord Chancellor said: "Suppose the petitioners had consigned over goods to *Jullian* as their factor, and he had sold them, and turned them into money, the principal then could only have come in as a general creditor under the commission; but if the goods had continued in specie and had been found in *Jullian's* hands at the time of his bankruptcy, it would have been otherwise, and has been so determined in several cases." That he treats as well ascertained law at that time. Then Mr. Justice *Willes*, in delivering the considered judgment of the Court of Common Pleas in the case of *Scott* v. *Surman* (4), says (5): "We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered anything in this action, but must have come in as creditors under the commission, as is laid down in the case of *Whitecomb* v. *Jacob* (6) and in many other cases." In the year 1800 the Lord Chancellor, in *Ex parte Sayers* (7), adopted the same view. He considered that there were in that case special circumstances which shewed that although the money had got into the general fund constituting the estate of the bank-

(1) 1 Atk. 165.
(2) Ibid. 172.
(3) Ibid. 232.
(4) Willes, 400.
(5) Ibid. 403.
(6) 1 Salk. 161.
(7) 5 Ves. 169.

rupt it had got out again, and he said it had acquired an identity and a distinction from the rest of the fund. Still he adopted the general principle that if it had been in the form of money at the time of the bankruptcy the creditor could only rank with the other creditors. Lastly, in the well-known case of *Taylor* v. *Plumer* (1), Lord *Ellenborough* adopted the same view. He said: "It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman* (2), or into other merchandise, as in *Whitecomb* v. *Jacob* (3), for the product of or substitute for the original thing still follows the nature of the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the *dictum* that money has no ear-mark must be understood in the same way; *i.e.*, as predicated only of an undivided and undistinguishable mass of current money."

That decision introduces the distinction from the case of *Whitecomb* v. *Jacob* which I referred to, and shews that money may be treated as ear-marked when it is physically separated from other moneys.

Those authorities appear to me to prove that the £74 17*s.* 7*d.* must be treated as being part of the common property of the bank, and in respect of that sum the claimants must come in as creditors.

Before parting with the case I am bound to say that upon principle I feel the greatest difficulty, because I think that the principles of equity are very much opposed to that line of decision. Let me put the point in this way: If it be a case of trustee and *cestui que trust*, and the trustee mingles with his own money the money which he holds in trust, can he as against the *cestui que trust* say that the money has so lost its character of trust money that it cannot be followed? Upon that point the observations of

(1) 3 M. & S. 562, 575. (2) Willes, 400. (3) 1 Salk. 161.

FRY, J.
1879
In re WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK.
Ex parte DALE & CO.

Lord Justice *Knight Bruce* in the case of *Pennell* v. *Deffell* (1) appear most forcible. He supposed the case of a trust fund kept separate, and he then refers to the case of a trust fund mingled, and asks whether that can make any difference, and says, "None, as I apprehend, except (if it is an exception) that his executors would possibly be entitled to receive from the contents of the repository an amount equal to the ascertained amount of the money in every sense his own so mixed by himself with the other money. But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly, be of any moment as between the various *cestuis que trustent* on the one hand, and the executors as representing the general creditors on the other." That seems a decision that as between *cestui que trust* and trustee the mixing of the fund is immaterial so long as there is a fund on which the *cestui que trust* can lay his hands. Does it make any difference that instead of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own. That seems to me to be the logical result of *Pennell* v. *Deffell*: but that result is opposed to the long line of authorities to which I have referred and from which I do not feel myself justified upon any reasoning of my own in departing.

13 Ch D 112

The result is, I hold that the £172 10*s.* belongs to the claimants, and the £74 17*s.* 4*d.* belongs to the general estate. The costs of both parties will come out of the estate.

Solicitors for *Dale & Co.*: *Clarke, Rawlins, & Clarke.*

Solicitors for *West of England Bank*: *Clarke, Woodcock, & Ryland.*

(1) 4 D. M. & G. 372, 382.

TAUNTON *v.* MORRIS.

C. A.
1879
Feb. 18.

[1874 T. 94.]

Husband and Wife—Wife's Equity to a Settlement—Life Interest—Amount to be settled.

A married woman has the same equity to a settlement, as against her husband or his general assignee, out of property in which she has only a life interest, as out of property in which she has an absolute interest; and the Court will make no distinction between the two cases as regards the amount to be settled. In every case the Court will exercise its judicial discretion as to the amount to be settled, having regard to all the circumstances.

A husband became insolvent in 1861 to a large amount, and his estate paid no dividend. In 1876 his wife became entitled to the income of property amounting to £500 a year.

The Court (affirming the decision of *Malins*, V.C.) ordered the whole income to be settled on the wife.

14 Ch D 507 — 577-8-9

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

Mr. *Taunton*, the husband of the Petitioner, Mrs. *Taunton*, became insolvent in July, 1861, being indebted to various creditors to the extent of £25,000; no assets of his estate had been discovered, and no dividend had been declared.

The Petitioner became entitled in 1876 to an income of about £500 a year, the capital being settled on her children under the will of her father, the testator in the cause. The income was not settled to the separate use of Mrs. *Taunton*, and no settlement or agreement for a settlement was executed on her marriage.

Mrs. *Taunton* asked to have the whole income settled on her.

The provisional assignee under Mr. *Taunton's* insolvency claimed half of the income for the benefit of the creditors.

The Vice-Chancellor directed the whole income to be settled on Mrs. *Taunton*. The provisional assignee appealed from this decision.

Glasse, Q.C., and *Langley*, for the Appellant:—

We admit that if the property in this case had been capital the Court could, in the exercise of its discretion, have settled the whole

(1) 8 Ch. D. 453.

C. A. 1879 TAUNTON v. MORRIS.

of it on the wife and children. But the Court has never acted on the same principle with respect to a life interest. The children have no interest in the income, and it is only a question between the wife and the husband or his assignees. The usual rule is to give half to the wife, and there is no reason why that rule should be departed from in the present case: *In re Duffy's Trust* (1); *Tidd* v. *Lister* (2); *Lea* v. *Church* (3); *Vaughan* v. *Buck* (4).

J. Pearson, Q.C., and *W. W. Karslake*, for Mrs. *Taunton*:—

The Court has never recognised a distinction between corpus and income when considering the amount to be settled on a married woman as against the general assignee of the husband. In every case, whether the property be corpus or income, the Court will exercise its judicial discretion, having regard to all the circumstances of the case: *Gardner* v. *Marshall* (5); *Scott* v. *Spashett* (6); *Squires* v. *Ashford* (7); *Dunkley* v. *Dunkley* (8); *Smith* v. *Smith* (9).

Glasse, in reply.

JAMES, L.J.:—

I do not know whether, if this case had come before me in the first instance, I should have made the same order as the Vice-Chancellor has done; but I cannot say that I differ from him so much that I feel myself constrained by the principles on which this Court acts to overrule his decision. One point that was pressed upon us in the argument was that a distinction is made in the authorities between the corpus and income of property in which a married woman claims an equity to a settlement. No doubt there is a distinction where the income has been sold by the husband to a particular assignee, as pointed out in *Tidd* v. *Lister* (10). The income may have been sold for the benefit of the wife and her family, or it may be a question whether the husband has neglected to support his wife; but a general assignee

(1) 28 Beav. 386.
(2) 10 Hare, 140; 3 D. M. & G. 857.
(3) 3 W. R. 603.
(4) 1 Sim. (N.S.) 284.
(5) 14 Sim. 575.
(6) 3 Mac. & G. 599.
(7) 23 Beav. 132.
(8) 2 D. M. & G. 390.
(9) 3 Giff. 121.
(10) 3 D. M. & G. 857. 18 Jur. 543.

(2) 1 C. 18 Jur. 543.

of the husband is in exactly the same position as the husband himself, and as against him there cannot be any distinction between a life interest and corpus.

Then the question is what ought to be done in the present case. The general rule is that it requires special circumstances to induce the Court to give more than one-half to the wife. Here the wife's whole interest is £500 a year, which is not much more than in the case before Vice-Chancellor *Stuart*, *Smith* v. *Smith* (1). The Vice-Chancellor has not considered that too much, and I cannot help thinking that if you take any of it away from the wife, it will only be thrown into the ocean of costs. It will not make a difference of more than twopence or threepence in the pound to the creditors, many of whom may be now dead. Therefore, under all the circumstances, I do not sufficiently differ from the Vice-Chancellor to induce me to reverse this decision.

BRAMWELL, L.J., concurred.

BRETT, L.J. :—

The principle of the Courts of Equity is one which we cannot but admire, that a settlement should be made of the wife's property. But in the course of time an artificial rule for carrying it out has been made, under which a certain proportion only is given to the wife. In modern times this artificial rule has fallen through; several cases have been cited in which the whole of the wife's property was settled, no distinction being made in them between corpus and income. The modern rule seems to be that all the circumstances of the case should be looked at, and that the Judge should exercise his judicial discretion as to the amount to be settled. Such circumstances are the amount of the property in question, the amount of the husband's debts, and the length of time since the insolvency. In the present case I think the length of time since the insolvency renders it quite an exceptional case. If it was not for the debts being kept alive by the insolvency all the husband's debts would have been barred by lapse of time; and doubtless, in fact, all have long ago been written off by the creditors as bad debts.

(1) 3 Giff. 121.

C. A. 1879 TAUNTON v. MORRIS.

Another thing to be considered is the amount of the property in question. If it had been an income of £1000 a year, probably the Vice-Chancellor's decision might have been different. Also, the relation of that amount to the amount of the debts must be taken into account. Whatever is not settled will certainly be frittered away in law expenses, and the creditors will get nothing. All these things must be considered in applying the principle of the Courts of Equity. On the whole, I entirely agree with the Vice-Chancellor's decision.

The appeal must be dismissed. The costs will be paid out of the income.

Solicitors: *A. S. Twyford; J. Crowdy & Son.*

C. A. 1879 *April* 28, 29.

WEST CUMBERLAND IRON AND STEEL COMPANY *v.* KENYON.

[1876 W. 30.]

Mine—Use of Property—Water discharged into Neighbouring Mine—Appropriation of Water.

12 Ch D 223

The Defendants, the owners of a mining property, sunk a shaft by which they tapped the water which had formerly found its way into certain old workings on their own ground, and had thence percolated into the Plaintiffs' mines. The Defendants then made a borehole at the bottom of the shaft. It was admitted that the making it was not in due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to let off the water into the above-mentioned old workings on the Defendants' ground, whence it percolated into the Plaintiffs' works in the same way in which it would have done if neither shaft nor borehole had ever been made:—

Held (reversing the decision of *Fry*, J.), that the Defendants had not by making the shaft so appropriated the water as to lay themselves under an obligation to keep it from coming upon the Plaintiffs' land, and that, as the effect of the Defendants' operations was not to throw upon the Plaintiffs' land any burden which it had not borne before, the Plaintiffs' case failed.

THIS was an appeal by the Defendants from a decision of Mr. Justice *Fry* (1).

(1) 6 Ch. D. 773.

Herschell, Q.C., *Cookson*, Q.C, and *Plummer*, for the Appellants:—

We do not dispute the finding of facts by the Judge, but we deny that there was any cause of action. The borehole was made to get rid of the water. If we had done nothing the water would have come to the Plaintiffs' mine just the same. It is not correct to say that we appropriated the water for our own benefit: we only wanted to get rid of it. No one has a right to complain of what I do on my own land, if what I do leaves him in the same condition as if I had done nothing: *Smith* v. *Kenrick* (1); *Smith* v. *Fletcher* (2); *Nichols* v. *Marsland* (3). It is for the Plaintiffs to shew that a larger volume of water comes to them than would have come if there had been no borehole, which they have not done. No damages can be claimed for any injury arising from gravitation and percolation: *Wilson* v. *Waddell* (4); *Bainbridge* on Mines (5).

North, Q.C., and *Ingle Joyce*, *contrà*:—

The question which the Defendants argued below was whether this borehole was made in the legitimate course of mining operations. They denied that it was made for the purpose of getting rid of the water. This ground they now give up. We do not dispute that the Defendants may allow the water to flow to our mines in the natural way.

[JAMES, L.J.:—What the Defendants say is, that they have a right to do what they please on their own ground provided they do not by their operations make the water come to your mines in a different quantity, or by a different channel, or at a different time.]

We rely on the principle laid down in *Hurdman* v. *North Eastern Railway Company* (6), that the causing by an artificial work the passage of water into a neighbour's land gives a right of action. If water which would have reached my land at one time is made by artificial means adopted for that purpose to reach it at an earlier time, that is an actionable wrong. The case of

(1) 7 C. B. 515.
(2) Law Rep. 9 Ex. 64; 2 App. Cas. 781.
(3) 2 Ex. D. 1.
(4) 2 App. Cas. 95.
(5) Page 307.
(6) 3 C. P. D. 168.

C. A. 1879

WEST CUMBERLAND IRON AND STEEL COMPANY v. KENYON.

Westminster Brymbo Coal and Coke Company v. *Clayton* (1) is very like the present.

[JAMES, L.J.:—In that case the same water would not have found its way to the Plaintiffs' land if the Defendants had done nothing.]

If a man artificially stores up water on this ground he has appropriated it, and cannot then send it on his neighbour's ground: *Lomax* v. *Stott* (2). The rule is laid down in our favour in *Smith* v. *Fletcher* (3), and we contend that the Exchequer Chamber did not differ from the Court below as to the point of law, though a new trial was granted. The law is settled by *Baird* v. *Williamson* (4) and other cases, that a mine-owner is not liable for a flow of water owing to gravitation and percolation, but he must not be an active agent in sending it on his neighbour's mine. Here the borehole must have accelerated the flow of water into the Plaintiffs' land, or it would have been of no use to make it.

Herschell, in reply.

JAMES, L.J.:—

Upon the question of fact in this case, I have arrived at the same conclusion as Mr. Justice *Fry*, and, as it appears to me, there is no real conflict of evidence. The evidence shews that the water which was tapped by the *New Banks Shaft*, and which was afterwards discharged through the borehole into the Defendants' old workings at the *Limefitts Pit*, was water which, following the stratification of the country, had previously found its way into the same subterraneous hollows from which water was pumped up by the pumps which at one time were used at the *Limefitts Shaft*, and that the same water practically and substantially found its way down into those hollows to the same extent as it found its way afterwards through the shaft and the borehole. The evidence upon that is plain. Several witnesses were called, experts who know the country, who said that they had no doubt that every

(1) 36 L. J. (Ch.) 476.
(2) 39 L. J. (Ch.) 834.
(3) Law Rep. 7 Ex. 305.
(4) 15 C. B. (N.S.) 376.

particle of water would have gone down and must have been going down into the *Limefitts Shaft* when the pumps were going on; that being the course by which these water-bearing strata discharged their water so as to prevent its rising up above the sixteen fathoms, down to which distance the stratification was quite dry. It seems to me upon all the evidence, that there were these water-bearing strata draining down into the hollows that had been formed by the old workings of the principal vein of the *Limefitts* property, and thence into the lowest level, and that the Defendants made a shaft which did to a certain extent tap that water, but only diverted into that shaft (as I am satisfied) for a time the water, which previous to that diversion, was finding its way down into the lowest level.

Several witnesses, both for the Plaintiffs and Defendants, give evidence in exactly the same way, and if there was any case intended to be made that what the Defendants have done produces an extra substantial burden or change in the position of the Defendants by reason of more water being thrown upon them, I should have expected that there would have been some evidence directed to that point, and that there would have been some cross-examination of the Defendants' witnesses upon the point which they prove so distinctly, that is to say, that in their judgment and belief, and according to their knowledge, all the water had originally found its way down to the Plaintiffs' levels. Then, if that be so, the working of the Defendants' shaft and the borehole has not been shewn to have thrown any additional water whatever on the Plaintiffs. On the other hand, this is to be borne in mind, that the way in which the case is now presented to us on behalf of the Defendants is this: "We do not treat it as a mining question, it has nothing to do with the case of *Smith* v. *Kenrick* (1), or any particular law as applicable to mining, we deal with it exactly as if it were something on the surface. We have made certain things upon our land and we have done that without doing you any mischief whatever. That is to say we have done something on our own land, as we had a right to do; we had occasion (or not having any occasion we were minded) to sink a shaft in our own land, and finding that that shaft was getting filled with water, we made

(1) 7 C. B. 515.

C. A. 1879 — WEST CUMBERLAND IRON AND STEEL COMPANY v. KENYON. — James, L.J.

a drain from the bottom of that shaft so as to prevent the water accumulating which would have destroyed it. But we drained that water into our own land, we drained it into some old hollows which were there, and which were calculated to receive the water, and from which hollows the water no doubt found its way into the Plaintiffs' land, but found its way exactly in the same course as far as the Plaintiffs are concerned as before it left our hollow, in exactly the same place and in exactly the same way, and to exactly the same extent as it would have done if we had not done anything of the kind."

Now Mr. Justice *Fry* seems to have thought that if once a man appropriated water (which does not seem to me to be a very accurate expression, because the very last thing in the world the Defendants intended to do was the storing water so as to appropriate it), that the moment he had done something by which the water became collected in his hollow, then he became bound to discharge that water in such a way that it would never reach his neighbour's land. I am not aware that there is any principle or any authority for that proposition. I have always understood that everybody has a right on his own land to do anything with regard to the diversion of water, or the storage of water, or with regard to the usage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before. That is the common use of water. A man receives the rain water from his roof, he does not allow it to settle upon the surface, but he receives it on his roof, and collects it into the pipes, and then lets it go down upon his own land, and from his own land it gets into his neighbour's land. But unless his neighbour receives that water in some different way or quantity from what he had done before, there is no legal right of action. If a man chooses to make any quantity of fish ponds, or mill ponds, or artificial lakes, or pleasure waters, or fountains, or anything of that kind on his own land, he is at liberty to do so, provided that when he has finished doing so he does not increase the burden upon his neighbour. And if his neighbour complains, he

has a right to reply, "What is it to you what I have been doing on my own land? The same quantity of water leaves my land, and leaves my land through exactly the same aperture, and gets into your field in exactly the same way as it did before." If there is a lake on my property into which I drain my field, and there is a passage from that lake into my neighbour's land, how can it signify whether I drain my field into the lake by one, two, or three openings, provided the same overflow as before goes through the same outlet into my neighbour's land? If the fact be, as we have found it to be, that the water which was turned by the shaft and borehole into the hollows about the *Limefitts Pit* was the same water which would have found its way into the same hollows independently of that shaft and borehole, it seems to me that the Plaintiffs have nothing whatever of which to complain.

The Defendants are no longer justifying themselves by the false issue which was fought in the Court below for so many days, namely, whether this was a proper mining operation. That false issue having been abandoned, we have nothing but a common case which may occur to anybody on the surface; that is to say, a man makes a pit on his land, and to prevent its being filled with water he puts a drain at the bottom of it and runs the water off into his own land, whence it finds its way to his neighbour's land in the same way as it had done before. I am of opinion that this is a case in which the Defendants have used their own land, and have not been shewn to have injured their neighbours in so using it, that the Plaintiffs have failed in shewing that they have any legal ground of action, and the action ought therefore to have been dismissed.

BRETT, L.J.:—

This action is brought on the ground of an alleged breach of the maxim *sic utere tuo ut alienum non lædas*. The cases have decided that where that maxim is applied to landed property, it is subject to a certain modification, it being necessary for the Plaintiff to shew not only that he has sustained damage, but that the Defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land. If the Plaintiff only shews that his own land is damaged by the Defendant's using his land in the natural manner, he cannot

C. A. 1879 — WEST CUMBERLAND IRON AND STEEL COMPANY v. KENYON. — Brett, L.J.

succeed. So he must fail if he only proves that the Defendant has used his land otherwise than in the natural way, but does not prove damage to himself. Both points are here in issue. For a long time both parties contended about one of these points, and not about the other. The Plaintiffs proved that the Defendants used their property otherwise than in the natural manner necessary to give them the due enjoyment of their rights of ownership, and otherwise than in the regular course of mining; but they failed to prove that any greater burden was thrown upon their land than it would have had to bear if the Defendants had done nothing, and Mr. Justice *Fry* seems to have been of that opinion.

If water percolates through the Defendant's land, and gets into a defined channel, and then goes into the Plaintiff's land, and the Defendant makes a pond which receives this water, and then makes a cutting which allows the water to go again into the same defined channel, so that the old flow into the Plaintiff's land is resumed, is the Defendant liable? Mr. Justice *Fry* says that he is, on the ground that the Defendant having collected the water has made it his property, and is bound to control it, and may not restore things to their original condition. With deference to him, I know of no such law. The merely obtaining a temporary control over the water does not impose on the Defendant the obligation of keeping it, nor prevent him from restoring it to the strata from which it came, unless he makes it flow differently. Therefore, agreeing with Mr. Justice *Fry* as to what I believe to have been his findings of facts, and his inferences from those findings, viz., that no larger quantity of water came to the Plaintiffs' land than if no shaft had been made, I differ from his view that the Defendants having once intercepted the water were not at liberty to let it go again.

COTTON, L.J.:—

The case launched by the Plaintiffs is that by reason of the operations of the Defendants a large quantity of foreign water is thrown upon the Plaintiffs' land, and that the Defendants have no right to send it there to the damage of the Plaintiffs. This is subject to the exception that if the flow of water is only the result of the Defendants using their land in the natural way, the

Plaintiffs cannot complain; and it is established by the cases that taking out minerals is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful and proper mining operations. To meet this the Plaintiffs allege that making the borehole is not a proper mining operation, and this is now admitted.

The question remains whether any substantial quantity of foreign water has been thrown upon the Plaintiffs' lands by the operations complained of, and this is a question of fact. Mr. Justice *Fry* does not appear to have come to a positive conclusion on this point, but he seems to have considered that the water which went through the borehole would have found its way to the Plaintiffs' land if the Defendants' shaft had not been made. In this I agree with him.

Now, underneath the Defendants' land were old workings reaching up to the *Limefitts Shaft*. While the pumping was continued there, the water was prevented from finding its way to the Plaintiffs' land. The pumps were abandoned, and the water from the old workings penetrated into the Plaintiffs' land, and threw additional pumping upon them. The water which passed through the borehole went into these same old workings, and thence percolated into the Plaintiffs' land. The Plaintiffs say it lies on the Defendants to shew that the making the borehole threw no additional burden on the Plaintiffs' land. Assuming that to be so, the question is whether we ought not on the evidence to say that without the borehole the same water would have found its way to the Plaintiffs' works, and that therefore no additional burden is imposed on them. I am of opinion that this is the conclusion to be drawn from the evidence.

We then come to the ground taken by Mr. Justice *Fry*. He says that the Defendants, by making the shaft, appropriated the water, and made themselves masters of it, and so became bound to prevent it from flowing into the Plaintiffs' works. This is a fallacy. The action is not for damage done by allowing that water to escape. If a case were made that the water was allowed to escape suddenly, it would be quite a different matter, but nothing of the kind is alleged. The complaint made is that the Defendants, by making the borehole, have prevented their shaft

C. A. 1879 — WEST CUMBERLAND IRON AND STEEL COMPANY v. KENYON.

from being a water-containing reservoir. Now, if, in consequence of this, the water had entered the Plaintiffs' land by a different course, the Plaintiffs would have had quite another case, but all that the Defendants have done is to alter the course of the water into a reservoir on their own land. There is an alteration in the way it gets there, but there is no addition to the water thrown into the Plaintiffs' lands, nor any variation in the time of its getting there. I am therefore of opinion that the action fails.

Solicitors: *Bischoff, Bompas, & Bischoff; Speechly, Mumford, & Co.*

C. A. 1878 — V.-C. H. *July* 4. — C. A. 1879 *May* 2, 3, 5.

ALLEN *v.* SECKHAM.

[1876 A. 146.]

Constructive Notice—Lights—Agreement.

Disputes having arisen between the Plaintiff and *W.* whether a window in the Plaintiff's house overlooking *W.'s* land was an ancient light, an agreement, not under seal, was signed by which *W.* agreed that the Plaintiff should have access of light to the window, and the Plaintiff agreed to keep the window opaque and make it open only in such a way that no person could look out of it. *W.'s* land was afterwards sold to the Defendant, who had no actual notice of the agreement, but knew of the existence of the window:—

Held, by *Hall*, V.C., that the Defendant, seeing the window when he purchased, was put upon inquiry, and was affected with constructive notice of the agreement, and therefore must be restrained from interfering with the access of light to the window.

Held, on appeal, that the mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them.

The *dicta* of Lord *Chelmsford* in *Miles* v. *Tobin* (1) dissented from.

In 1867 the Plaintiff purchased certain property at *Wellingborough* upon which was an old building which he pulled down and rebuilt. A question then arose between him and Mrs. *Wallis*, the owner of the adjoining property, whether a certain window in the new building, which the Plaintiff alleged to be substantially identical with an ancient window in the old building, was an

(1) 16 W. R. 465.

ancient light. Ultimately the dispute was settled by an agreement in writing, not under seal, dated the 6th of March, 1869, by which, *inter alia*, it was agreed that the Plaintiff should have an indefeasible right to the access of light and air to the window on condition that he should forthwith make the glass of the window opaque, and that he, his heirs and assigns, should keep it opaque, and make it open in such a way as only to admit air without allowing any one to look out.

In May, 1876, the Defendant purchased the property of Mrs. *Wallis*, and it was not disputed that he completed his purchase without any actual notice of the above agreement.

The Defendant shortly after his purchase pulled down a wall which stood on his property opposite to the window, and commenced erecting a building of greater height and slightly nearer to the window than the old wall was.

The Plaintiff on the 18th of July wrote to the Defendant stating that the proposed new building would entirely obstruct his light and air, that he could not allow his right to be infringed, and that if the Defendant built according to the plans, he must do so at his own risk. He did not in any way refer to the agreement of 1869. The Defendant then negotiated with the Plaintiff for the purchase of the Plaintiff's property, but the negotiation proved abortive, and the Defendant proceeded to build. The building was carried to its full height before the writ in this action was issued.

On the 28th of September, 1876, the Plaintiff commenced his action for an injunction to restrain the Defendant from building or suffering to remain built on his premises any wall or building so as to darken, injure, or obstruct the access of light and air to the Plaintiff's window.

The action came on for trial before Vice-Chancellor *Hall* on the 4th of July, 1878.

Chester, for the Plaintiff.

Dickinson, Q.C., and *Owen*, for the Defendant:—

There is an entire absence of notice of the agreement; there is not any evidence that the light is an ancient one, and there is no proof of any subtantial injury to make a case for an injunction.

C. A. HALL, V.C.:—

1879

ALLEN v. SECKHAM.

I do not give any opinion on the question whether the Plaintiff has established a right to protection in respect of an ancient light. I determine the case in the Plaintiff's favour upon his right founded upon the agreement between himself and *Ann Wallis* dated the 6th day of March, 1869. That agreement, which was entered into after certain disputes had arisen between the parties, clearly provides for the enjoyment of the light at that time existing. It was submitted that the Defendant had not notice of the agreement, and was therefore not bound by it; but he saw the window when he purchased the property, and seeing it, I hold that he was put upon inquiry, and in that respect his rights are no higher than those of *Ann Wallis*, through whom he claims. There are, I think, many authorities for that opinion, but I will refer to only one, *Davies* v. *Marshall* (1). I think there has been substantial interference with the Plaintiff's light. There has not been anything in the Plaintiff's conduct—laches or acquiescence—to deprive him of his right, and therefore I grant a mandatory injunction, which must be so framed as to shew the title arising under the agreement of 1869, and define the limits within which the Defendant must keep his new building upon the property acquired from *Ann Wallis's* representatives. The order must be limited so as to determine in case of a right to obstruct the light arising under the agreement with *Ann Wallis*, her heirs and assigns.

C. A. The Defendant appealed. The appeal came on for hearing on the 2nd of May, 1879.

Owen, for the Appellant:—

The Defendant had no notice. No case was cited below on the question whether seeing the window was notice, the case of *Davies* v. *Marshall*, referred to by the Vice-Chancellor, turning on an entirely different point. The only case I find having any bearing on the question is *Hervey* v. *Smith* (2), which is disapproved of by Lord *St. Leonards* (3); and if sound, it does not govern this case,

(1) 10 C. B. (N.S.) 697. (2) 1 K. & J. 389; 22 Beav. 299.
(3) Sug. V. & P. 14th Ed. p. 765.

for there the party complaining was in actual possession of an erection upon his neighbour's land. The Plaintiff has no legal right apart from notice of the agreement: *Leech* v. *Schweder* (1). Apart from the agreement, this is not on the evidence an ancient light. The Plaintiff is bound by acquiescence, for he did not say anything about the agreement when he complained of the Defendant's building.

[JAMES, L.J.:—He insisted that he had a right, so there cannot be acquiescence, though he did not tell you on what his right was founded.]

But supposing the light to be an ancient light, the Plaintiff cannot have a mandatory injunction, for my building was carried to its full height before the writ issued. The Court will not in such a case grant a mandatory injunction unless the injury is extreme: *Durell* v. *Pritchard* (2); *City of London Brewery* v. *Tennant* (3). In *Krehl* v. *Burrell* (4) the building was erected after writ issued.

Chester, contrà, was desired in the first case to address himself to the question of notice:—

The existence of a window suggests a right to light, and puts a person who sees it upon inquiry, especially where the height of the buildings opposite is much less than is usual in metropolitan buildings. The case comes within the principle which Mr. *Dart* (5) deduces from *Morland* v. *Cook* (6), and *Hervey* v. *Smith* (7).

[JAMES, L.J.:—In the latter case a person was enjoying something in his neighbour's land, and was a trespasser unless there was some agreement.]

In *Davies* v. *Sear* (8) the existence of an archway was held to give notice of a right of way under it. In *Miles* v. *Tobin* (9) Lord *Chelmsford* held that the existence of windows was constructive notice of a right of access of light to them.

(1) Law Rep. 9 Ch. 463, 475.
(2) Ibid. 1 Ch. 244.
(3) Ibid. 9 Ch. 212.
(4) 7 Ch. D. 551; 11 Ch. D. 146.
(5) Dart, V. & P. vol. i. p. 453.
(6) Law Rep. 6 Eq. 252.
(7) 1 K. & J. 389; 22 Beav. 299.
(8) Law Rep. 7 Eq. 427.
(9) 16 W. R. 465.

C. A. 1879 ALLEN v. SECKHAM.

JAMES, L.J.:—

I am of opinion that the decision of the Vice-Chancellor cannot be sustained on the ground on which he put it, and that it would be very dangerous to carry the doctrine of constructive notice to this length. That doctrine, as applied by the Vice-Chancellor, would come to this, that a purchaser is to be held to have constructive notice of every agreement relating to any structure which he sees on the adjoining ground. A man often builds a house with windows overlooking his neighbour's ground, taking his chance of acquiring a right to access of light by twenty years' enjoyment, and to say that a purchaser of the adjoining property is bound to inquire whether he has not acquired that right by agreement, is a strong and dangerous extension of the doctrine of constructive notice. The cases cited are quite different in principle. In *Morland* v. *Cook* (1) the purchaser saw the property protected by a sea-wall, and the Court considered that every reasonable man under such circumstances must be taken to have known that the wall existed for the protection of the lands below the level of the sea, and that there must be some provision made for its maintenance and repair, and that therefore he was put upon inquiry. As to *Hervey* v. *Smith* (2), which is doubted by Lord *St. Leonards*, it is not necessary to decide whether it stretched the law beyond proper limits; it is sufficient for the present purpose to say that it went on a principle not applicable to the present case, for there the purchaser was taken to have seen that the owner of the adjoining house had the actual possession and use of flues which in the absence of agreement must have been part of the purchased property. The case of the archway is also quite distinguishable from this. An archway is only left for a purpose, and its existence suggests an agreement giving a right of passing under it. How does that apply to the existence of windows? A man is at liberty to build upon his own land a house having as many windows as he likes. He is not by so doing interfering with any rights of his neighbours. He may acquire a right under the *Prescription Act*, but there is nothing in the mere sight of a window to put a person on inquiry what title there is to access of light to it, any more than to put him on inquiry as to the obligation of the owner of the

(1) Law Rep. 6 Eq. 252. (2) 1 K. & J. 389; 22 Beav. 299.

window to keep it opaque, or to make it open only in a particular way. In *Miles* v. *Tobin* (1) Lord *Chelmsford* used some expressions which are strongly in the Plaintiff's favour, but they were wholly extrajudicial, for nothing in that case turned on notice. The defendants knew that the plaintiffs derived title from the same grantors as themselves, the common grantors being the trustees of a charity. The Court came to the conclusion that the lease under which the plaintiffs claimed, and which was prior to the lease to the defendants, bound the plaintiffs to build according to particular plans; the lease, therefore, if not in express terms, at all events by necessary implication, gave the plaintiffs a right to the use of the windows prescribed by those plans. This was a right granted by deed, which bound the adjoining lands of the grantors, apart from any question of notice. Any person who buys land in this country buys subject to the chance that the vendor may have granted all manner of rights over it, and against this chance he guards himself by taking the covenants of the vendor. The case of *Miles* v. *Tobin* was simply one of a grant by deed made by the person under whom the defendants derived title, and the remark of Lord *Chelmsford*, which has been relied on, was a mere *obiter dictum*, which appears to have remained in the Weekly Reporter, and not to have found its way into any other books so as to become part of our traditionary law. We therefore do not consider ourselves bound by it, and we think that such an extension of the law as to constructive notice would be dangerous and unwarranted.

BRETT, L.J.:—

The doctrine of constructive notice ought to be narrowly watched and not enlarged. Indeed, anything "constructive" ought to be narrowly watched, because it depends on a fiction. We are, however, bound by the authorities, and I conceive that when a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden. But it seems that the rule goes

(1) 16 W. R. 465.

C. A. 1879 ALLEN v. SECKHAM.

further, and that when a state of circumstances exists which is very unlikely to exist without a burden, he is affected with notice. The case of an existing tenancy is an instance of the first proposition. The tenant cannot legally be in possession without having some rights, and his possession is held to give notice to a purchaser what those rights are. In the case of the chimneys, Lord *St. Leonards* doubted whether there was notice. If it had been shewn that the purchaser knew that there were flues in his house which belonged to fire-places in the other house, then there would have been a visible state of circumstances which could not have legally existed without the owner of the other house having some right. The difficulty is in attributing to the purchaser knowledge of a fact which would be so likely to be overlooked. The case of the sea-wall comes within the principle that a visible state of circumstances exists, such as to make it extremely probable that there is a servitude. So in the case of the archway: a man seeing an archway leading to a neighbour's back land, and apparently forming the only approach to it, would at once infer that the neighbour in all probability had a right of way. The case before Lord *Chelmsford* did not require the decision of any point as to notice at all, for there was a deed of grant imposing a servitude, and if his Lordship meant to say that the mere fact of the existence of windows puts a purchaser upon inquiry as to the right to use them, which probably is going further than he meant, we must, with all respect, say that such a doctrine is more than reason requires; and as the case did not really involve the point, the remarks are not binding on us. Windows are frequently made in situations where they are liable to be obstructed, the owner being in hopes of coming to some arrangement about lights, or being disposed to take his chance of acquiring a right by lapse of time. This is not, therefore, a case where the visible state of things makes the existence of a servitude extremely probable, and to hold that the purchaser was affected by notice would be to stretch the rule beyond reason.

COTTON, L.J.:—

In this case there is no covenant running with the land, and the Defendant can only be affected by the agreement in question if

he bought with notice of it. It is clear that he had no actual notice, and the only circumstance by which he can be affected with constructive notice is, that he knew of the existence of the window. Now, on what principle is notice of the agreement to be inferred? Where a tenant is in possession of the property sold, the principle is, that his being there is manifestly inconsistent with the vendor's being absolute owner. The tenant must have some rights, so the purchaser is bound to inquire what they are. But this cannot be applied to a window. A man by opening a window claims no right over his neighbour's property; the fact of the window being there raises no presumption of any right. Then as regards the authorities. Whether the case of the chimney-pots be right or wrong, it is wholly different from this, for there a person was using a flue in his neighbour's house; here the owner of the window is doing nothing of which anybody could possibly complain. The case of the sea-wall cannot be treated as analogous. The Master of the Rolls there came to the conclusion that the purchaser must have seen that he had the benefit of the sea-wall, and therefore could not evade the burden. In *Davies* v. *Sear* (1) the purchaser bought a house with an archway evidently intended as a means of transit to the land beyond; he let people go on building till it was the only means of transit to that land, and then wished to close it. The question in that case really was whether, in the conveyance to him, there was not by implication a reservation of a right of way, and whether, after lying by as he did, the purchaser could insist on his right if he originally had any. The only other case is that before Lord *Chelmsford*, and everything that fell from him deserves great respect, but we must look to the facts. That was a case where the defendants had taken a lease of building land, with knowledge that the same lessees had let other land to the plaintiffs for building purposes, and that under that lease a building had been erected with windows overlooking the land taken by the defendants. A case so circumstanced cannot be cited as an authority for the general proposition in support of which it is relied on, and the Vice-Chancellor does not refer to it in his judgment. I agree, therefore, in considering that the

(1) Law Rep. 7 Eq. 427.

C. A. 1879 ALLEN v. SECKHAM.

Defendant is not to be taken to have purchased with notice of the agreement.

The case then proceeded upon the question whether the light was an ancient light, and the Court came to the conclusion that it was, and that there had been sufficient diminution of light to give the Plaintiff a cause of action, but that as the injury was trifling, and the action had been commenced so late, the case was not one for a mandatory injunction. To avoid the expense of further proceedings, the Court assessed the damages at £50, the Defendant undertaking to put clear glass into the Plaintiff's window.

Solicitors: *J. J. Rae; R. Metcalfe.*

C. A. 1877 FRY, J. *Nov.* 28, 29. C. A. 1878 *July* 13, 18. FRY, J. 1879 *May* 21, 22, 26, 27.

ROBINSON *v.* DULEEP SINGH.

[1876 R. 78.]

Common Appurtenant—Fold-course—Right of Lord to approve—Digging Gravel Pits — Inclosure round Warren-house — Curtilage — Statute of Merton (20 *Hen.* 3), *c.* 4—*Statute of Westminster the Second* (13 *Edw.* 1), *c.* 46—*Grant—Construction—"Warren of Conies"—Estoppel—Practice—Verdict on Issues in Suit between Predecessors of Parties.*

A fold-course is not a several right to the herbage, but a right of common appurtenant of pasture for sheep.

Lords of manor can by the *Statute of Merton* approve against common appurtenant of pasture. The proviso in the *Statute of Westminster the Second*, c. 46, only prevents derogation from an express grant.

A demise of "all that warren of conies in *L.*":—

Held, by *Fry*, J., under the circumstances, to pass the soil of the warren and not merely a franchise.

Hall v. *Byron* (1) followed.

Observations on *Earl Beauchamp* v. *Winn* (2).

The verdict on issues in a suit between predecessors in title does not in itself create an estoppel. The decree and the pleadings must be taken into consideration.

THE Plaintiff was the owner in fee of a messuage and lands, known as the *Lakenheath Hall* estate, situate in the manor and parish of

(1) 4 Ch. D. 667. (2) Law Rep. 6 H. L. 223.

Lakenheath, in the county of *Suffolk*. Part of his estate was of ancient freehold tenure, and the residue had been copyhold of the manor, but had been enfranchised in June, 1867, by the Dean and Chapter of *Ely*, the then lords of the manor. The Plaintiff in his statement of claim alleged that he and the former owners of parts of the *Lakenheath Hall* estate, and their respective tenants, had during a time whereof the memory of man runneth not to the contrary enjoyed as of right and without interruption, as appurtenant to the ancient freehold part of the *Lakenheath Hall* estate, a liberty of a freehold fold, or fold-course, or right of pasturage for 200 sheep at all times of the year, in the whole of a tract of land or rabbit warren, commonly called *Lakenheath Warren*, situate in the manor and parish of *Lakenheath*, and containing upwards of 2000 acres. The Plaintiff alleged that he was also seised of two other freehold liberties of fold, or fold-courses, or pasturages, each for 300 sheep in all the warren, which were respectively formerly copyhold of the manor as appurtenant to the copyhold parts of the *Lakenheath Hall* estate, but which had been enfranchised as above mentioned. The Plaintiff also claimed a fourth fold-course for 300 sheep as appurtenant to another tenement known as *Risley's*. He alleged that the right of Sir *Simeon Stuart*, a predecessor in title of the Plaintiff to the *Lakenheath Hall* estate, to the freehold fold-course and to two of the other then copyhold fold-courses was found by the verdict of a jury given at the last of two trials of the first of certain issues directed by the High Court of Chancery in a suit instituted in 1736 by the then Dean and Chapter of *Ely* (the then lords of the manor) as Plaintiffs against Sir *Simeon Stuart* as Defendant, and by Lord *Hardwicke's* judgment in accordance with that verdict.

The statement of claim as originally delivered alleged that the Defendant had lately purchased and claimed to be seised of the fee simple and inheritance of *Lakenheath Warren*, and that he had lately caused to be dug and carried away large quantities of gravel and other soil from the upper part of the warren, next to the *Lakenheath Hall* estate, and in so doing had dug up and destroyed upwards of forty acres of the pasture thereon, and that the Defendant had also inclosed more than seven and a half acres of the warren, around a lodge thereon, called the *Warren Lodge*,

C. A. 1878

ROBINSON v. DULEEP SINGH.

with a wall of earth about four feet high, and that a belt round the interior of the inclosure had been dug up and planted with trees for the purpose of forming a screen. The Plaintiff alleged that by these acts the Defendant had deprived the Plaintiff of the benefit of his fold-courses over the lands so dug up and inclosed, and that the Defendant threatened and intended to continue the digging and removal of the soil.

The Plaintiff claimed a declaration of his right to the fold-courses, and that he might have the benefit of the decree or order in the suit of the *Dean and Chapter of Ely* v. *Stuart*, and an injunction.

By his statement of defence the Defendant admitted that he had dug gravel on the warren, but denied that he had destroyed the pasture to anything like the extent alleged by the Plaintiff, and denied that any injury had been caused to the Plaintiff. And the Defendant claimed, as owner of the soil, the rights of digging and taking away and selling the gravel as his predecessors in title had been accustomed to do, and he alleged that, notwithstanding the digging for gravel complained of, and the inclosure round the *Warren Lodge*, sufficient feed remained on the warren to satisfy the Plaintiff's rights and all other rights over the warren. The Defendant denied that the inclosure round the *Warren Lodge* was so large as alleged by the Plaintiff, and submitted that what had been done was merely a necessary enlargement of the curtilage of the *Warren Lodge*, and he justified the same as an approvement of part of the soil of the warren, and averred that sufficient feed was left to satisfy all rights of common, and that the soil approved was such as to be useless for pasture.

The bill referred to in the statement of claim was filed by the Dean and Chapter of *Ely* against Sir *S. Stuart* in 1736. It alleged that the Defendant had been a lessee of the Dean and Chapter of certain lands, and that he had entered into a covenant for the delivery up of those lands upon the expiration of his term, and sought specific performance of that covenant. It then suggested that, notwithstanding the expiration of the demise, he claimed a right of common for his sheep on the Plaintiffs' common, which was the same as the warren to which the present litigation related. It admitted his right to two fold-courses for 300 sheep, and denied any further right.

Sir *S. Stuart* put in his answer, in which he alleged possession under the lease, and stated that he was seised according to the custom of the manor of the piece of land called "*The One and a Half Acres*," together with the liberty of fold and fold-course for thirty sheep to the said close belonging, holden by copy of court roll of the manor of *Lakenheath*. He then went on to allege that he was also seised according to the custom of the manor of "*The Bord*" tenement, together with one other liberty of fold or fold-course for 300 sheep, and he further alleged seisin in fee simple of certain other freehold messuages with liberty of one freehold fold-course for 200 sheep, and then he alleged immemorial enjoyment by himself and his predecessors in title consistently with the rights which he had alleged.

At the hearing Lord *Hardwicke* dismissed the bill so far as it sought specific performance of the covenant contained in the lease, and he decided that Sir *S. Stuart* had no right of common in respect of certain lands within the *Bedford Level* not in question in the present litigation, and then proceeded to state that "As to the right of common claimed by the said Defendant in the said warren, or any other uplands of the said manor lying out of the said *Level*, it was ordered that the parties should proceed to a trial at law," and issues were then stated in these terms:—"First, whether the Defendant Sir *S. Stuart* was entitled to any and what liberty or liberties of a fold-course or fold-courses for any and what number of sheep in the said warren, or in any other or what uplands of the said manor lying out of *Bedford Level*. Secondly, whether the Defendant was entitled to any common of pasturage for himself, his farmers and tenants, of his freehold messuages and lands lying within the said manor of *Lakenheath* in the said warren, or any other and what uplands of the said manor lying without *Bedford Level*, for all his and their commonable cattle as appended or appurtenant to the Defendant's said freehold messuages and lands or any or which of them. Thirdly, whether by the custom of the said manor of *Lakenheath* the Defendant was entitled to common or fold for himself, his farmers and tenants, of his copyhold messuages and lands lying within the said manor in the said warren, or in any other and what uplands of the said manor lying out of *Bedford Level*, for his own

C. A. 1878

ROBINSON v. DULEEP SINGH.

and their commonable cattle as belonging to the said copyhold messuages and lands or any and which of them." And then it went on to provide that if the jury should find any particular right or rights of common other than should be specially described in the issues the same was to be indorsed upon the *postea*.

The issues were tried in the year 1740. The jury found, on the second issue, that Sir *Simeon Stuart* was entitled to common in respect of his freehold messuages and lands in the manor of *Lakenheath* for all his great cattle levant and couchant thereon in the said warren every year at all times of the year. On the third issue they found that the Plaintiff Sir *Simeon Stuart*, by the custom of the said manor of *Lakenheath*, was entitled to common of pasture in respect of his copyhold messuages and lands in the said manor for all his great cattle levant and couchant thereon. Nothing was said in either verdict about sheep.

The verdict on the first issue was not found satisfactory, and a new trial was directed of that issue, when it was found that Sir *Simeon Stuart* was, according to the custom of the manor of *Lakenheath*, entitled to the liberty of two several copyhold fold or fold-courses for 300 sheep each in the warren every year and at all times of the year.

On the cause coming on for further directions, on the 7th of February, 1746, Lord *Hardwicke* ordered that the respective rights of the several parties found by the first verdict on the second and third issues be established according to the said verdict, and that the respective rights of the several parties found by the verdict on the first issue be established according to the said verdict last mentioned, and that the Plaintiffs and their successors, and also the Defendant and his heirs, do quietly enjoy their said respective rights so found and established against each other, and all persons claiming under them respectively.

The action came on for trial before Mr. Justice *Fry* on the 28th of November, 1877.

Sir *J. Fitzjames Stephen*, Q.C., and *W. R. Fisher*, for the Plaintiff.

Sir *H. S. Giffard*, S.G., and *Vaughan Hawkins*, for the Defendant.

After hearing the Plaintiff's case and the Defendant's opening,

the Defendant having admitted that he had done the acts complained of by the Plaintiff, Mr. Justice *Fry* stopped the case, and declined to hear the Defendant's evidence.

1877. Nov. 29. FRY, J.:—

The only question which I have now to decide is whether or not an injunction should be granted in the terms of the second paragraph of the prayer of the statement of claim, and of course whether costs should be awarded in favour of the Plaintiff.

Now it appears to me that the Plaintiff is entitled to an injunction upon a short ground. The Plaintiff claims four separate rights for the grazing of sheep—four separate sheep-walks. I think I may fairly put it in that way. One of them is claimed in respect of a freehold piece of land called "*Lacey*." That is for 200 sheep. Another is claimed in respect of a piece of land called "*The Bord*" tenement, which was copyhold, and has since been enfranchised. The third is claimed in respect of a piece of land known as "*The One and a Half Acres*," which was copyhold, and has been enfranchised; and the fourth is claimed in respect of certain land known as "*Risley's*."

I do not intend to base my judgment upon the fourth claim, for this reason—that no declaration of rights being now asked, and no damages being now sought, I think there is enough to require me to grant an injunction without entering into the matters which are controverted with regard to that fourth sheep-walk, "*Risley's*."

In 1746 a decree was pronounced by Lord *Hardwicke* upon a bill brought by the Dean and Chapter of *Ely* against Sir *Simeon Stuart*, that bill having been filed in 1736. It is not now in dispute that the three sheep-walks to which I have referred in the first instance were part of the properties claimed by Sir *Simeon Stuart*, and that the Plaintiff has shewn a title derived from Sir *Simeon Stuart* to those three sheep-walks. It is equally not in controversy that the Defendant in the present action represents the Plaintiffs in that old suit in Chancery; because the Defendant, the Maharajah *Duleep Singh*, has derived title under the Dean and Chapter. I have, therefore, before me in the present litigation the persons representing and claiming title under the Plaintiff and Defendant

C. A. 1878 ROBINSON v. DULEEP SINGH. FRY, J.

in that suit—their places, however, being changed. It becomes, therefore, of the last importance to consider what is the nature of the decision in that Chancery suit; especially as it is upon that that my present judgment will proceed.

[His Lordship then stated the effect of the bill in question in the suit of the *Dean and Chapter of Ely* v. *Stuart* and the issues which were directed, and continued:—]

Now it becomes important in the first place to observe that there is a marked distinction between the three issues. The first issue is directed to inquire whether the Defendant had any and what liberty or liberties of a fold-course, for any and what number of sheep in the warren. It does not inquire whether that was as appendant or appurtenant to freeholds, or to copyholds, or to which of them, or to what lands. Now it is evident to my mind that, if that first issue had been directed to the inquiry with regard to common, it would necessarily have gone on to inquire in respect of what land that right of common was claimed, and whether it was claimed as appendant or as appurtenant, and it would have been highly material and necessary to inquire whether those lands were part of the freehold lands which Sir *Simeon Stuart* claimed, or part of the copyhold lands which he claimed. Then, when you come to the second and third issues, you observe that the inquiry is addressed to any right of common in the very same locality as to which the previous inquiry as to the liberties had gone, but being addressed to rights of common it goes on to make the particular and proper inquiries as to the land in respect of which that was claimed, and the nature of the claim—that is to say, whether the common claimed was appendant or appurtenant. Then the great exactitude of the decree is indicated by this, that it was thought possible that the evidence might justify some finding which was not in the precise terms of either of those inquiries with regard to common; and therefore it went on to direct that, if any particular right of common other than those specially described in the issues was found, it was to be indorsed upon the *postea*. Now it might be contended that the second and third issues being directed to common with regard to "all his and their commonable cattle," the finding with regard to some commonable cattle was not within it; but it is quite plain to my mind that that case is provided for

by the last direction to which I have referred, and if the jury had found a right of common for sheep upon the warren, it was to be found in the answers to the second and third issues, and that that limitation of the right was to be indorsed upon the *postea* in accordance with the directions so contained in the decree.

The next observation I have to make is this, that the right to have the herbage upon particular lands consumed by the sheep of a particular person, may be claimed in one or other of two ways. It may be claimed in that which is undoubtedly the more usual of the two ways, namely, as a right of common; but it may equally well be claimed as a tenement existing at law, capable of being created either in respect of freehold or of copyhold estate. That that is so appears to me to be perfectly plain from the two passages which have been referred to in *Coke* upon *Littleton*. In one passage (1) it is distinctly laid down in these terms, "If a man hath twenty acres of land, and by deed granteth to another and his heirs *vesturam terræ* and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass because he hath a particular right in the land." Then Lord *Coke* goes on to explain the limitations upon that particular right, and then he says, "The same law if a man grants *herbagium terræ*, he hath a like particular right in the land and shall have an action *quare clausum fregit*." That such a tenement may be held by copy of court roll is, in my opinion, equally certain and is equally determined by the other passage (2) of the same high authority. There Lord *Coke* is inquiring what things may be granted by copyhold, and he says, "Generally all lands and tenements within the manor and whatsoever concerneth lands or tenements may be granted by copy: as a fair appendant to a manor may be granted by copy." Therefore, that same right to the vesture or the herbage of the land might be granted by any mode by which such tenements can be created. It might be created by grant, and it might be created by copy of court roll, and, therefore, such a liberty or right might exist either by right of common, or as an independent tenement created by grant or copy of court roll.

The next observation I desire to make is this: it has been very strenuously argued by Mr. *Vaughan Hawkins* that the expression

(1) 4 b. (2) 58 b.

C. A. 1878 ROBINSON v. DULEEP SINGH. FRY, J.

"fold-course" is *ex vi termini* expressive of a right of common and of nothing else. In my opinion that contention is not correct. I think that a "fold-course" is a word which may be used, and rightly used, to express a right of sheep-walk, to express a right or privilege of having one's sheep to feed over the lands of another person, whether that right be granted by copy of court roll or by grant, or whether it be claimed in the nature of common.

Now the earlier authorities support that view. In *Sharp* v. *Bechinowe* (1), where the expression "fold-course" is used, it is given as the equivalent of the Latin *cursus pro ovibus*, and in the note it is said "Foldæ cursus est a sheep walke or feed pur oves." Therefore, whatever may be the etymology, whatever may be the history of the expression, it appears to me that the expression "fold-course" is applicable to any sheep-walk or any right however derived of one person to take by his sheep the vesture from the land of another.

I ought, perhaps, to observe that by the decree the issues were directed to be settled by the master, so that the greatest attention was given to the form of the issues. I ought also to observe, having construed the issues in the way I have, that I do not think I am at liberty to reject what appears to be the obvious construction of them, because all those issues are prefaced by an expression as to the rights of common. I think that to do so would give a forced and unnatural expression to mere introductory words, and I think those words are sufficiently explained by the fact that the Plaintiffs had suggested that all the Defendant's rights were claimed by him as rights of common, which view the Defendant did not acquiesce in. Now it becomes necessary to consider what happened upon those issues. The issues went down to trial. They were first tried in the year 1740. At that trial, on the second issue, it was found "that the said Sir *Simeon* was entitled to common for himself, his farmers and tenants, of his freehold messuages and lands lying within the said manor of *Lakenheath* for all his and their great cattle levant and couchant upon his freehold messuages and lands within the said manor in the said warren within the said manor of *Lakenheath* yearly and every year at all times of the year;" and that he was entitled to certain

(1) Lutw. 398.

other common rights to which I need not refer. Therefore, it is quite clear that, so far as common was dealt with, the common of pasture was found, not, be it observed for all his commonable beasts, but for his "great cattle," and therefore the construction which I have put upon the issue, namely, that it directed the Judge to inquire from the jury in respect of what commonable beasts the right of common existed, was the view taken at the trial, and the view which governed the answer to the inquiry and the verdict of the jury. Then, with regard to the third issue, it was also found that "the Defendant, Sir *Simeon Stuart*, by the custom of the said manor of *Lakenheath* was entitled to common of pasture for himself, his farmers and tenants, of his copyhold messuages and lands lying within the said manor of *Lakenheath* for all his and their great cattle levant and couchant upon his said copyhold messuages." Nothing was found with regard to common of sheep. Now, that appears to me to amount to this, that the jury, in effect, found that the Defendant had no commonable right of sheep. The finding upon the first issue was not deemed satisfactory to the Court. Sir *Simeon Stuart* obtained leave to proceed to a further trial of that issue, and upon that further trial of the first issue it was found that "Sir *Simeon Stuart* was, according to the custom of the manor of *Lakenheath*, entitled to the liberty of two several copyhold fold or fold-courses for 300 sheep each in all the place called *The Warren*, within the said manor of *Lakenheath*, every year, at all times of the year." Now, it will be observed that that is a finding as distinct as possible from the finding with regard to the common rights. It finds, in my opinion, that it is a distinct tenement, held by copy of court roll, to which Sir *Simeon Stuart* was entitled in the piece of land called *The Warren*, and to which, as I have pointed out, he might be entitled by law. It found in the same manner that he was further entitled to another liberty of a freehold fold or fold-course for 200 sheep in "all the place called *The Warren* within the said manor of *Lakenheath* every year at all times of the year." That, again, is similar. There is no finding with regard to the particular freehold land in respect of which it arose, whether appendant or appurtenant, and, in my opinion, the finding of the jury is not of a right of common, but of the existence

C. A. 1878 — ROBINSON v. DULEEP SINGH. — FRY, J.

of a tenement in Sir *Simeon Stuart*, derived by him by grant from the owner of the property. Well, then, Lord *Hardwicke*, on the cause coming before him on further consideration, ordered and decreed "that the respective rights of the several parties found by the first verdict on the second and third issues be established according to the said verdict, and that the respective rights of the several parties found by the verdict on the first issue be established according to the said verdict last mentioned, and that the Plaintiffs and their successors, and also that the said Defendant and his heirs, do quietly enjoy their said respective rights so found and established against each other and all persons claiming under them respectively." Therefore, in my opinion, the Defendant is by that decree found to have certain rights, and Lord *Hardwicke* quieted him in the possession of those rights.

Now, what has been done is this—the Defendant, who claims under the Plaintiffs in the old Chancery suit, instead of allowing the Plaintiff to enjoy his rights quietly, has disturbed those rights. He has inclosed seven and a half acres of land round a certain lodge called the *Warren House* or *Warren Lodge*, and he has dug up a considerable space of ground, and has rendered a portion of the warren unfit for the food of sheep by digging gravel pits there and destroying the herbage and vesture upon the land. It is quite true that the portion so dug over and the portion so inclosed bear a very small proportion to the entire warren; but it seems to me, if I am right in the construction which I have put upon this judgment of Lord *Hardwicke*, and if the Plaintiff is entitled as a separate and independent tenement to these three rights of sheep-walk, that anything which interferes with the land over which the rights of sheep-walk exist so as to deprive the sheep of the Plaintiff of the capacity to feed upon any portion of that land is a trespass, and it cannot be denied that when a trespass has been committed this Court has now clear jurisdiction by injunction.

It appears to me, therefore, that it has been made out that the Plaintiff has these three separate rights of sheep-walk, and that they are tenements which cannot be disturbed without a breach of the decree pronounced by Lord *Hardwicke*. The rights of the Plaintiff have been disturbed by the Defendant, and, as a consequence, the injunction must go.

With regard to the terms of the injunction, no observations have been addressed to me. It appears to me that it should go to restrain "the Defendant, his servants, agents, and workmen from inclosing or building upon the said *Lakenheath Warren*, and from permitting or suffering to remain inclosed or built upon any part of the said warren which was not inclosed or built upon when the warren came into possession of the said Defendant, and from digging up and taking away the gravel, sand, and soil of the said warren, and from digging or ploughing up, or otherwise destroying, and from permitting to remain dug up and destroyed, the pasture, turf, and herbage growing thereon, and from permitting the surface of the same or any part thereof to remain covered with heaps of gravel, sand, or soil, or dug out in pits or ditches, and from otherwise preventing or interfering with the exercise by the Plaintiff of his liberties of fold or fold-courses, sheep-walk, and pasture for sheep." I see no objection to the form of the prayer. Of course, the result of my judgment being in favour of the Plaintiffs, it must be with costs.

As I understand there will be an appeal from my decision, the mandatory part of the injunction which directs the pulling down and filling up will be suspended for three months, the remainder of it will be immediate.

From this decision the Defendant appealed. The appeal came on to be heard on 13th of July, 1878.

Sir *H. S. Giffard*, S.G., *Joshua Williams*, Q.C., and *Vaughan Hawkins*, for the Appellant:—

The Defendant is not estopped by the finding of the jury on the issues in the old Chancery suit. The finding cannot be rightly understood without looking at the pleadings and the decree. The issues were merely to inform the conscience of the Court. It is clear from the whole proceedings that the finding of the jury was that there was a right of common, which in *Norfolk* is called a fold-course. The decree says that the Defendant in that suit was entitled to a fold-course; and the real question now is whether a fold-course is a right of common or a several right of pasture. We contend that it is a right of common appurtenant to a

C. A. 1878 ROBINSON v. DULEEP SINGH.

tenement, not itself a tenement, and that if so, the lord of the manor can inclose part of the waste over which the common extends provided he leaves sufficient for the commoners.

In *Spelman's* Glossary *faldagium* is translated *fold-course*, and is thus defined:—*Privilegium erigendi et circumagendi faldæ seu ovilis, per certam camporum extensionem: eorundem stercorendi gratiâ et gregis fovendi.* It was originally the lord's privilege to fold the tenant's sheep on his own land; that was properly called foldage; and there was a corresponding privilege of the tenant to turn out the sheep on the lord's waste by day, which was properly called fold-course. In process of time the tenant's right became the most important part of the right; and the word "fold-course" acquired its present meaning of a right of common of pasture for sheep originally folded on the lord's land. This meaning is shewn by several old cases: 1 Edw. 3 (1); 3 Edw. 3 (2); 1 Hen. 7 (3); *Punsany and Leader's Case* (4); *Keilwey's* Reports (5). The lord exonerated the tenants from the obligation to fold their sheep on his land, and his right became absolute or was commuted, and the tenant's right of pasture recovered. There are many other cases shewing that fold-course is a common appurtenant, and shewing the distinction from foldage: *Musgrave* v. *Cave* (6); *Day* v. *Spoone* (7); *Bac.* Abr. (8); *Fielding* v. *Wren* (9); *Sharp* v. *Bechinowe* (10); *Dickman* v. *Allen* (11); *Sheppard's* Touchstone (12); *Co. Litt.* (13); *Corbet's Case* (14); *Fitzherbert* Nat. Brev. (15); *Hoskins* v. *Robbins* (16); *Daniel* v. *Hanslip* (17); *Jones* v. *Richards* (18); *Baylis* v. *Tyssen-Amhurst* (19).

If the Plaintiff's right is a right of common the Defendant has a right to approve under the *Statute of Merton* and the *Statute of Westminster the Second.* The effect of Mr. Justice *Fry's* judgment

(1) Hil. pl. 4.
(2) Hil. pl. 7.
(3) Pasch. pl. 17.
(4) 1 Leon. 11.
(5) Page 198.
(6) Willes, 319.
(7) Sir W. Jones, 375; S. C. Cro. Car. 432.
(8) Tit. Common, A.
(9) Cary, 65.
(10) Lutw. (Nelson's Translation), 398.
(11) 2 Vent. 138.
(12) Vol. i. p. 93.
(13) 6 a. (Hargrave's note).
(14) 7 Rep. 5 (a).
(15) Page 179 (b).
(16) 1 Vent. 163.
(17) 2 Lev. 67.
(18) 6 A. & E. 530.
(19) 6 Ch. D. 500.

is to give the Plaintiff the exclusive use of the soil, and yet it was admitted that the Defendant is the owner of the inheritance. But even if the Defendant is only the owner of a warren of conies he has a right to build a lodge for the preservation of his game: *Coke's* Institutes (1).

Southgate, Q.C., and *W. R. Fisher*, for the Plaintiff:—

We claim a higher right than a right of common. But if it is a right of common, it is common appurtenant, and in that case the lord has no right to approve: *Day* v. *Spoone* (2); *Grant* v. *Gunner* (3). Our right is like what is called in the north of *England* a "cattle gate": *Rigg* v. *Earl of Lonsdale* (4). It is not a common right, but arises either by grant or prescription, and therefore there can be no right of approving, because it would be in derogation of the grant or supposed grant. It is clearly stated in Lord *Coke's* observations on the *Statutes of Merton* and *Westminster the Second* in his Institutes (5). The *Statute of Westminster the Second* expressly says, "But if he do claim common by a special feoffment or grant for a certain number of beasts, or otherwise which he ought to have of common right, whereas covenant barreth the law, he shall have such recovery as he ought to have had by form of the grant made to him."

But we say that this is really a freehold tenement, and not a right of common. That is the effect of the finding of the jury in the Chancery suit, and the Defendant is bound by that finding. We do not deny that the fold-course was in one sense a common, because several tenants have fold-course on the same warren; nor do we claim to hold the right of ~~purchase~~ to the exclusion of the lord. But it is different from an ordinary right of common, and could only have come into existence by a grant from the lord.

[COTTON, L.J.:—If the first grant was a several right, how could the lord grant a second several right? And if these several rights could be granted, in what respect do they differ from rights of common?]

(1) Pt. iv. 298.
(2) Sir W. Jones, 375.
(3) 1 Taunt. 435.
(4) 1 H. & N. 923.
(5) Pt. ii. 86 (4); Pt. iv. 473.

C. A. 1878 ROBINSON v. DULEEP SINGH.

They differ from rights of common in their origin; and they are tenements in respect of which actions for trespass can be maintained: *Welcome* v. *Upton* (1). Rights of foldage, as being different from ordinary rights of common, are mentioned in the 25 Hen. 8, c. 35, and *Blomefield's* History of *Norfolk* (2). Any act, however small, in violation of that right is a trespass which this Court will restrain.

JAMES, L.J.:—

Upon the points of law which have been raised I am of opinion that we must decide according to the views of the Appellant.

I do not think that the learned Judge was warranted in stopping the case upon the points of law upon which he alone proceeded. The case of the Plaintiff is this—that he has a certain right called a right of fold-course over certain lands of which the Defendant is the admitted owner, consisting of a warren and other lands. He had rights for feeding and pasturing certain distinct numbers of sheep, those rights being derived under distinct titles. Then the Defendant's case was, as I understand, this: "True it is you have a right of common of pasture appurtenant to certain tenements of yours" (for, as I understand, he does not dispute the right of common), "but I maintain that what I have done is a thing which I have a right to do; I have been merely approving what is my own without any substantial disturbance of your rights as a commoner. More than that, I allege if necessary that what I have done is so trifling that it is not subject matter of an injunction." Those are the issues which the Defendant was prepared to raise, and in the course of the hearing the learned Judge seemed to come to a conclusion which was, I think, scarcely consistent with the statement of claim in the case. It so happened that in the time of Lord *Hardwicke* there was a contest between the predecessor in title of the Plaintiff and the predecessor in title of the Defendant, and that in that contest certain issues were raised, and those issues were found in such a way by the jury that, taking the issues alone without any regard to the pleadings, even without any regard to the preamble or the introductory words of the order by which the issues were directed,

(1) 6 M. & W. 536. (2) Vol. i. p. 200.

or the subsequent words referring to those issues—but taking the strict legal meaning which the learned Judge appears to have attributed to the words found by the jury—there was a distinct finding which it is contended amounted to a *res judicata* between the parties that the present Plaintiff is entitled to a right in the nature of a *sola separalis pastura*, or *prima vestura*, or right of that kind, a right in respect of which the Plaintiff could have maintained trespass *quare clausum fregit* against the owner or anybody else as distinct from any action for the mere disturbance of the right of common, or any other *profit à prendre*. In my view of the case the learned Judge was first of all inaccurate, with all respect, in thinking that he was bound to look or that he was entitled to look at the issues, without regard to the pleadings or the order directing the issues, without regard to the mode in which the decree afterwards dealt with them. The issues are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right; and what determines the right between the parties is the decree, and in order to determine what the decree really decides it is essential to see what were the rights which were in dispute between the parties and which were alleged between them. Because if the Court had gone beyond the rights which were properly in issue between the parties the decree of the Court would be absolutely null and void. It is not to be supposed that a Judge like Lord *Hardwicke* could have intended to make a decree or deal with anything not in issue between the parties, for the determination of which he would require the assistance of the jury of the county upon a question of fact. Therefore it appears to me that it was absolutely essential in order to arrive at the meaning of the issues to ascertain the meaning of the findings of the jury as they were understood and accepted by the Court which directed the jury to inquire into them. Looking at that, it appears to me impossible not to see that what the learned Lord Chancellor was desiring to ascertain then was whether Sir *S. Stuart* had rights that were in their very nature rights of common, dealt with as rights of common, and called rights of common in the very introduction to the order. It seems to me impossible not to see that this was the meaning of the issues, and therefore that the issues themselves defined not an exclusive right, not a

C. A. 1878 ROBINSON v. DULEEP SINGH. James, L.J.

right in the nature of a tenement giving the man a close, but a right to the enjoyment of a *profit à prendre* over the soil of the Defendant. Even independently of the pleadings, if I had to determine upon the plain meaning of the issue itself, unexplained by anything else, I should say that the first issue is as plain an issue directed to a right of common as against a lord as it is possible to conceive. The words are "liberty" and "liberty of fold-course." From the meaning of the words it appears to be a course of sheep; therefore it is a liberty, or right of feeding, of taking by particular animals, and by particular animals only, and to a particular amount only, the pasturage of something else, which something else remains entirely in the lord himself, and must do so from the very nature of the thing. But when you add to that that there were three or four several rights having different origins, one in respect of one tenement, another in respect of another tenement, over the very same piece of ground, it appears to me from the very nature of the case that it was properly expressed to be and was a right of common. I cannot really doubt that every one of these rights was a right of common appurtenant to the lands, as in fact it was claimed in the suit against Sir *Simeon Stuart*, and as it is in fact claimed in the statement of claim before us. It is said that although it is a right to be enjoyed in common with the lord and in common with other persons, somehow or other it is a several right higher than a right of common. I am bound to say I have not been able to appreciate the argument, for I have not been able to understand how each tenant of a manor, each occupier of the land, each grantee has a distinct right and is capable of being dealt with by himself in his own several right; a right to enjoy the pasture in common with others must, in my opinion, from the very nature of the case, be a right of common. If it is a right of common, it is a right of common appurtenant. That being so, the whole foundation upon which the learned Judge stopped the case seems to me to fail.

However it was contended, further, that he might have decided it, and that we ought now to decide it in the same way, to save the parties from the expense of going into the evidence about the question of fact; that we ought to say that there is no right to

approve, or to inclose, or to dig gravel on any waste upon which there is any right of common appurtenant, as distinguished from right of common appendant; a very startling proposition, and unless it can be carried to the extent that any waste however large, any right of common appurtenant however small, would prevent the lord from digging a spadeful of gravel, or sinking a shaft to get at coal, or do any other act interfering with in any way the surface upon which the grass is growing or may grow. Unless we can carry it to that extent it is utterly impossible for us to dispose of the case on an assertion of a right of that kind. It is not necessary to say anything more on it. We cannot do that. Therefore it is absolutely necessary that the case should go back for further inquiry whether the Defendant has done any act which is such a violation of the Plaintiff's rights of common appurtenant as would entitle the Plaintiff to an injunction.

BRETT, L.J.:—

This case was tried before Mr. Justice *Fry*, and as I understand it, he heard the Defendant's case opened, and it being admitted that the Defendant had done some act on the land which was the subject-matter of discussion, he declined to hear any more and stopped the evidence, holding that upon that admission of the Defendant's case, however slight the act might have been, the Plaintiff was entitled to recover. His reason was that the Plaintiff had a title by an adjudication of Lord *Hardwicke* in a suit between the predecessors of the parties, that that title was *res judicata*, and any act of the Defendant upon the land in question was a trespass. In order to shew that that was the real meaning of his judgment it is necessary to look at more than one part of it. In one part he says, "Now, the next observation I have to make is this, that the right to have the herbage upon particular lands consumed by the sheep of a particular person may be claimed in one or other of two ways. It may be claimed in that which is undoubtedly the more usual of the two ways, namely, as a right of common; but it may equally well be claimed as a tenement existing at law capable of being created either in respect of freehold or of copyhold estate." By which it seems to me from what follows that the learned Judge meant, it may be equally well claimed as

C. A. 1878 ROBINSON v. DULEEP SINGH. Brett, L.J.

a tenement existing at law capable of being claimed either as a freehold or copyhold estate. For that he cites Lord *Coke* (1): "If a man hath twenty acres of land and by deed"—a deed, that is, which is put in evidence—"granteth to another and his heirs *vesturam terræ* and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass because he hath a particular right in the land." Therefore he cites that to shew, not that the ownership of the land passed, but that the particular right passed to the Plaintiff, and then he says: "Then Lord *Coke* goes on to explain the limitations upon that particular right—'The same law, if a man grants *herbagium terræ*, he hath a like particular right in the land and shall have an action *quare clausum fregit*.'" Now, he makes this citation from Lord *Coke* in order to justify the judgment that he is about to pass, and then further on he says: "And if the Plaintiff is entitled, as to a separate and independent tenement, to these three rights of sheep walk, anything which interferes with the land over which the right of sheep walk exists, so as to deprive the sheep of the Plaintiff of the capacity to feed," not to feed as much as they want, but of "the capacity to feed on any portion of that land, is a trespass, and it cannot be denied that when a trespass has been committed, this Court has now clear jurisdiction by injunction." It seems to me, therefore, that the judgment of Mr. Justice *Fry* was this: That the judgment of Lord *Hardwicke* had adjudicated that the Plaintiff here had an exclusive right to a sheep-walk over this land; had an exclusive right, such a right as entitled him to maintain against the lord an action of trespass *quare clausum fregit* if the lord did anything whatever upon the land. Now, the question is whether that was the adjudication in the suit before Lord *Hardwicke*. It seems to me that Mr. Justice *Fry* too rigidly confined himself to the form of the issues, and that he construed those issues as if they had been the only things before him; that he construed them as if they had been the whole case, instead of construing the decree of Lord *Hardwicke*. He founds himself upon this: he says there were three issues. They are different in form, and that shews that the first was an issue with a particular intention, that that issue was simply whether the Defendant in the suit was

(1) Co. Litt. 46.

entitled to a fold-course or fold-courses for any and what number of sheep.

Now, founding himself upon the passage cited from Lord *Coke*, he seems to think that the finding upon that issue did entitle the Plaintiff's predecessors to say that they had a grant by a deed of a fold-course, and that that was equivalent to a grant of an exclusive fold-course, as if it had been a grant *vesturæ terræ*, and that therefore the finding of the jury was that the Plaintiff's predecessors had an exclusive right, such a right as entitled him to say to the lord, "You must not do anything upon the land in respect of which this right was claimed in that suit; if you do anything, the Plaintiff's predecessor would have been entitled to an action of trespass *quare clausum fregit*." In answer to that, as I understood the argument of Mr. *Joshua Williams*, it was said that that issue ought not to be so construed, because if you looked at the bill and answer in the case, you would have seen that the issue was asked subject to an admitted fact in the pleadings, viz., that it was claimed only as a right of common of pasture. But then Mr. *Williams* went further, and said if that had not been so, the mere use of the term "fold-course" of itself imported that the right which was in question there was merely a right of common of pasture. Now, *primâ facie*, I should think that the term "fold-course" did mean only a common of pasture. All the authorities cited seem to shew that. But if there was a grant by a deed which was before the Court, shewing, although it used the term "fold-course," by other parts of it that the sole and exclusive right was granted, it seems to me that the passage cited from Lord *Coke* would have shewn that such a grant might have passed the exclusive possession of the land. It is not necessary, therefore, at least in my view, to say whether that issue would in terms of itself import that only a right of common of pasture was claimed, because I think that the issue ought not to be construed without reference to the bill and answer which were before Lord *Hardwicke*. What my Brother *Fry* inadvertently, or by mistake, did was to construe those issues as if they were the only documents, instead of looking at the decree of Lord *Hardwicke*, which decree must have been formed upon the bill and answer as well as upon the findings on the issues. If the learned Judge who tried

C. A. 1878 ROBINSON v. DULEEP SINGH. Brett, L.J.

the issues with the jury had been misled by the form of the issue, and had tried the case upon an interpretation of that issue which Lord *Hardwicke* did not mean, it is impossible to suppose that Lord *Hardwicke* would not have sent the issue back to be tried again, even though it would have been for the fourth time. Therefore it seems to me that the error here is in looking at the issue only, instead of looking at the decision upon which the decree went.

Now, looking at Lord *Hardwicke's* decree, his decision was not that the Plaintiff's predecessor had the exclusive right which is now set up, but, on the contrary, Lord *Hardwicke's* decision was that the Plaintiff's predecessor was entitled only to a common of pasture. Therefore, with great deference to my Brother *Fry*, instead of this being an estoppel or *res judicata* in favour of the Plaintiff, it would rather, if anything, seem to me to be *res judicata* or estoppel in favour of the Defendant. But however that may be, it seems to me that my brother *Fry* unhappily did misinterpret the decree of Lord *Hardwicke*, and that in so misinterpreting it he held wrongly that it was an estoppel in favour of the Plaintiff, and if it was not an estoppel in favour of the Plaintiff in the nature of having been an adjudication upon his title, then he wrongly prevented the Defendant from going into evidence.

I think, therefore, that the judgment is wrong, and that the case is similar to that where a Judge at *nisi prius* having heard a case opened has either nonsuited the Plaintiff or directed a verdict for the Defendant, and the Court does not uphold such a ruling. In such a case the Court cannot come to a decision, because the evidence is not before it, and there must be a new trial. Here, therefore, it seems to me that there must be a further inquiry, the Defendant being at liberty to bring forward his evidence.

COTTON, L.J.:—

The only question before us is this, whether it is established that the title of the Plaintiff is such that the Court was right in granting an injunction to restrain the Defendant from digging and inclosing or otherwise approving on the waste called "*The Warren*," simply because of the Plaintiff's title, and without reference to the question whether or no there was any substantial injury, or whether or no sufficient waste was left to enable the

Plaintiff to have sufficient pasture for the number of sheep for which he claimed a right to it.

Now it is put in two ways. The one only which was decided by Mr. Justice *Fry* I will take first. He held that the decree made in the suit between the parties' predecessors in title had settled the question in favour of the Plaintiff, and that looking at the title as established by that decree, without allowing the Defendant to go into any evidence, he ought to grant the injunction which the Plaintiff asked for.

I must confess that I had some difficulty, even after having heard all the arguments, in making up my mind as to what Mr. Justice *Fry* considered was the nature of the Plaintiff's right as established by that decree. I say so, because parts of his judgment may seem as if he thought that the right of the Plaintiff was, if not a right of common ordinarily so called, yet that which in substance I cannot see to differ as regards the question before us from an ordinary right of common appurtenant. There was some argument by Mr. *Vaughan Hawkins* about a fold-course, and Mr. Justice *Fry* says: "It is a word which may be used rightly to express a right of sheep-walk, to express a right or privilege of having one's sheep to feed over the lands of another person." What is that but the right of a commoner who is entitled to a right of common appurtenant? He has a right to pasture his sheep over the land of the lord; and if that was the right which Mr. Justice *Fry* considered established by the decree as being the Plaintiff's, I cannot see how we could, without allowing the Defendant to go into evidence, at once in consequence of the title established by that decree, grant the injunction which has been granted. But I think that cannot be what the learned Judge meant. I think the true key to his judgment is that passage from *Coke* upon *Littleton* read by Lord Justice *Brett*, and that he must have dealt with the case as if the right of the Plaintiff, established by Lord *Hardwicke's* decree, was the right of several pasturage or the several right to the herbage of the warren. On that ground, considering that to be the true construction of the decree, he thought that it followed that the acts complained of in this case were an invasion of the Plaintiff's property, and that, therefore, an injunction ought to be granted. What is dealt with

C. A. 1878

ROBINSON v. DULEEP SINGH.

Cotton, L.J.

in that passage from *Coke* upon *Littleton* is this, that if there is a grant of the herbage, although the freehold of the soil does not pass, yet trespass may be maintained. It is something like what one sees more frequently where the surface is in one person and the minerals in another person, where there are two several tenements in the same soil, entirely separate and distinct. If the herbage is granted to a person, that does not grant to him the freehold of the soil, but it grants to him a several right in the herbage. What is meant by that? That he has the sole and exclusive right to the herbage, not for a limited time only, but in fee for ever. If there had been a grant of a several right of pasture or of a several right of herbage, as Mr. Justice *Fry* seems to have considered was established by the decree, then I cannot see how the grantee of that right can, by any possibility, not have had an exclusive right. The Plaintiff is claiming this right in respect of three several fold-courses, or perhaps two, and it is admitted that there are other persons who have similar rights of fold-course, and that the ordinary commoners, using that word in the sense of the copyhold tenants having rights of common, have also a right of common ordinarily so called over the land in question. I put it to Mr. *Fisher* during his argument, "Is it your case that all the grants of all these fold-courses were made at one time?" because if the right of the fold-course is a several right of pasture, that is, sole and exclusive, or a several right of herbage, which, as I understand the term, must be sole and exclusive, I cannot conceive how, when that right has once been granted to any one, there can be any further grant to any one else. It is impossible to suppose that all these grants of fold-course were made at one instant, and it seems to me that when once it is admitted that in this case the lord of the manor has rights of pasturage, Mr. Justice *Fry's* judgment loses its foundation—viz., that the Plaintiff's right is a several right of pasture or of herbage, whichever you please to call it. I think he must have considered it to be that, from the way in which he framed his decree, and from the observations he made in his judgment.

Is anything of the sort established by Lord *Hardwicke's* decree? I can conceive a grant of a right of pasture on a field, together with a covenant never to use the field except for pasturing the

grantor's or the grantee's cattle; but it is not suggested that anything of the sort was set up in the suit before Lord *Hardwicke*, or established by his decree. Can it be said that it established a right of several pasture, or a several right to herbage?

As I have already observed, one must not take the issues in that suit alone. They were issues directed for the purpose of enabling the Court to decide on the rights claimed by the parties to the suit. Nowhere throughout the pleadings is any such right claimed by the Defendant in that case. On the contrary, by his answer, he puts it in a way in which I should suppose a man would put a right of common ordinarily so called. Curiously enough, in one place in his further answer, he does claim it as appendant to the arable land of which he was grantee from the lord of the manor; but certainly he does not claim it in any way as a several right of pasture or a several right to the herbage. Then, one must of necessity look at the decree, which, and not the issues, must decide the rights of the parties, and at what is recited in the decree, viz., the pleadings which are recited sufficiently to enable us to see what were the questions raised, and on what the Court had to adjudicate. In my opinion such a right as Mr. Justice *Fry* considered was in the Plaintiff, was not raised, and there is no decision in favour of any such right by the decree of Lord *Hardwicke*.

There was another point which was referred to and argued by Mr. *Southgate*. If the right of the Plaintiff, he said, is a right of common, it is common appurtenant, and against that there can be no approvement. No doubt this must be, if it is a right of common, in the nature of common appurtenant. But is it true that there can be nothing in the nature of approvement as against common appurtenant? In my opinion we cannot deal with the question independently of the *Statute of Merton*. For that statute in the most general terms gives the right as against common of pasture, and I should say that that included common appurtenant as well as common appendant. In the present case, it must be remarked that assuming the right of the Plaintiff is in the nature of a right of common, he, in express terms in his pleadings, claims it as appurtenant to certain property which he mentions.

Then it is said that the *Statute of Westminster the Second* was in

C. A. 1878 ROBINSON v. DULEEP SINGH. Cotton, L.J.

favour of the contention of Mr. *Southgate*, and that that expressly prohibits this advantage being taken of the *Statute of Merton* as against a right of this kind, a right of common appurtenant. I pointed out in the course of the argument that what preceded the passage read by Mr. *Southgate* was this—"and this shall be observed," that is to say, the right of the lord to approve, "for such as claim pasturage as appurtenant to their tenements." He relies upon what follows—"but if any do claim common by special feoffment or grant for a certain number of beasts or otherwise which he ought to have of common right, whereas covenant barreth the law, he shall have such recovery as he ought to have had by form of a grant made unto him." It seems to me that the meaning is clear, and that this case is untouched by it, because common appurtenant depends upon a presumed or implied grant, and therefore, when this statute says, "and this shall be observed for such as claim pasture as appurtenant to their tenements," it must be applied to the case of presumed grant. What follows is in effect this, that if a man produces his grant which says that he shall have a grant not only of sufficient pasture for his cattle—which I suppose would be the presumed grant—but pasture for a certain number of cattle over all and every part of a certain waste, then the statute is not to enable a man to derogate from that which has been expressly granted. Here there is no express grant the terms of which the Defendant is violating, but it is said that this is a right which is prescribed for and depends on a presumed grant, and therefore the Defendant cannot avail himself of the *Statute of Merton*, because the *Statute of Westminster the Second* prevents him from doing so. In my opinion that is a misconstruction of the statute, which, giving the right, or recognising the right, as existing against such as claim pasturage as appurtenant to their tenements—that is, by presumed grant—says that it shall not apply so as to enable a man to derogate from that which he has expressly and in terms granted. It does not say that in no case of express grant shall he be entitled to do what the Defendant is, in the present case, doing. If it is not in derogation of the express terms of his grant, why should the Court prevent him from doing it? In my opinion we cannot but come to the conclusion that, if this is a right of common, it is in the nature of

common appurtenant, and that as against such a right of common the *Statute of Merton* applies.

Therefore on both grounds the opinion I have formed upon this point is, that it cannot be said that the Court ought to have granted an injunction without considering the facts of the case, and without seeing what in fact was done, and how far, if at all, the Plaintiff's rights to the pasturage were affected.

JAMES, L.J.:—

The order will be:—The Court being of opinion that the Plaintiff's rights are those only of an owner of common appurtenant, the judgment of the Court below is discharged, and the learned Judge must be asked to resume the hearing where he left it off. The Appellant will have his costs of the appeal.

After the hearing of the appeal the Plaintiff obtained leave to amend his statement of claim, and amended it by alleging that the Defendant was, or claimed to be, by virtue of an indenture of the 7th of November, 1872, made between the Ecclesiastical Commissioners for *England* and himself, the owner of a right of warren for conies in *Lakenheath Warren*, subject to all rights of common, rights of pasture, and other rights then affecting the right of warren thereby conveyed, and that the Defendant was not, at the dates of the several acts complained of, and never had been, seised of or otherwise entitled to the soil of *Lakenheath Warren*, or of any part thereof.

The Defendant then amended his statement of defence by alleging that he was seised of the soil of the warren, and that it had been conveyed to him by the Dean and Chapter of *Ely* by the indenture of the 7th of November, 1872.

The further trial of the action came on before Mr. Justice *Fry* on the 21st of May, 1879.

It then appeared that by an indenture of lease dated the 5th of November, 1866, the Dean and Chapter of *Ely*, in consideration of the surrender of a former lease of the premises thereinafter demised, dated the 21st of May, 1858, and in consideration of £725 paid by *H. R. Evans*, did demise, grant, and to farm let, unto *Evans*, his

FRY, J.
1879
ROBINSON
v.
DULEEP
SINGH.

executors and administrators, "all that their warren of conies in *Lakenheath* as it is there marked out and described by its proper metes, boundaries and borders; and also all those two several lodges, with the messuage or tenement to one of them adjoining, standing upon and within the said warren; and also the stock of conies upon the said warren; together with all ways, easements, profits, commodities, and appurtenances to the said warren belonging or appertaining; except and always reserved out of this present demise unto the said dean and chapter and their successors pasture within and upon the said warren for the feeding and sustaining of the sheep of the said dean and chapter, or of the tenants or farmers of their sheep-courses or sheep-fold in *Lakenheath* aforesaid, with free ingress, egress, and regress for the said sheep and for the said shepherds following and watching them while so feeding and depasturing there, and also to seek the dead, lost, or stray sheep, if any should happen, and so drive them to and from thence to fold: To have and to hold the said warren of conies, lodges, and messuages, together with the stock of conies on the said warren and the future increase thereof, and all other the premises aforesaid (except as aforesaid)" unto *Evans*, his executors and administrators, for the term of twenty-one years from Michaelmas, 1866, at the yearly rent of £20, and also six score couple of good rabbits at divers times in every year, to be delivered in the manner and at the times therein mentioned. There was a proviso that if the rent or the rabbits should be in arrear for twenty days after the time appointed for payment and delivery thereof, or if the lessee should not observe and fulfil the covenants on his part therein contained, it should be lawful for the Dean and Chapter, and their successors, to "re-enter into the said hereby demised premises and every part thereof." There was a covenant by *Evans* that he, his executors and administrators, would yearly and every year during the term present and certify at the Leet, or at the Court of the Dean and Chapter holden in and for the manor of *Lakenheath*, "all transgressions and evil practices done or committed within the said warren, if the same shall come to his or their knowledge;" and a covenant that *Evans*, his executors and administrators, would, during all the term, "make, renew, preserve, repair, and sustain all landmarks, boundaries, banks, metes, and fences whatsoever within, about, and belonging to the said warren,"

and also would from time to time, and at all times during the term, "repair, sustain, and maintain the said lodges and messuage or tenement, with the appurtenances, and rebuild the same, if they should be decayed, fallen down, wasted, burnt, or destroyed (the accident of lightning or by fire from malicious persons from abroad only excepted), and the said warren, with the said landmarks, boundaries, banks, metes, and fences so made, renewed, preserved, repaired, and sustained, and with the said lodges, messuage or tenement so well and sufficiently repaired, sustained, maintained, and rebuilt," should deliver and yield up to the Dean and Chapter, or their successors, at the expiration or other sooner determination of the term. There was a further covenant by *Evans* that he, his executors or administrators, would at the end or other sooner determination of the demise, "leave and yield up to and for the use of the said Dean and Chapter, or their successors, upon the demised premises, 6000 conies at the least for the quick stock thereof, without any allowance or recompense for the same, and to pay for the deficiency under that number, or be allowed for the excess beyond that number, as the case may be." The warren and premises comprised in this lease had been for very many years previously from time to time demised by the Dean and Chapter to various tenants, a renewed lease being from time to time granted in consideration of the surrender of the prior lease and the payment of a fine. On the 29th of September, 1869, *Evans* assigned the premises comprised in the lease of the 5th of November, 1866, to the Defendant for the remainder of the term thereby granted, and on the 7th of November, 1872, the Ecclesiastical Commissioners for *England*, in whom the rights of the Dean and Chapter had then become vested, in consideration of £8800 paid by the Defendant, granted to him, his heirs and assigns, all their estate and interest in fee simple in reversion expectant on the determination of and subject to the indenture of lease of the 5th of November, 1866, "of and in all that warren of conies situate in the parish of *Lakenheath* in the county of *Suffolk*, as the same is marked out and described in the plan drawn in the front skin of these presents," freed and discharged from the manorial rights, rents, reversions, covenants, services, customs, and obligations, but subject to land tax (if any) unredeemed, and

FRY, J.
1879
ROBINSON
v.
DULEEP
SINGH.

to the tithe commutation rent-charge (if any), and "to all rights of way and other easements, and to all rights of common, rights of pasture, and other rights now affecting the same."

By the bill in the suit of the *Dean and Chapter of Ely* v. *Stuart*, the Plaintiffs alleged that they, being then seised of the manor of *Lakenheath* and of the demesne lands thereto belonging, and of all that coninger or warren of conies situate within the manor, containing 2500 acres, had by an indenture dated the 13th of August, 1715, demised to the Defendant the said warren of conies for twenty-one years, and had by another indenture dated the same day demised to the Defendant the site of the manor of *Lakenheath*, together with the demesne lands and the liberty of three folds or courses to the manor belonging and other property, and that the Plaintiffs' demesne lands and some lands of the Defendant's lying contiguous and intermixed, the Defendant refused to set out the Plaintiffs' lands and refused to perform some of the covenants in his lease, and notwithstanding the expiration of his lease claimed a right of common for his sheep upon the Plaintiffs' warren, to which they alleged he was not entitled. And the Plaintiffs prayed (*inter alia*) that the Defendant might deliver possession of the demised premises, and that, if necessary, a commission might issue to distinguish the same. By the decree made upon the hearing of the suit on the 14th of July, 1740, it was (*inter alia*) ordered that a commission should issue to distinguish and set out the warren and other lands comprised in the two leases of the 13th of August, 1715, or either of them, and that the commissioners should cause the said warren and lands to be distinguished and set out by metes and bounds, and that possession thereof should be delivered by the Defendant to the Plaintiffs, or of such parts of the same whereof possession had not been already delivered.

It also appeared from the parish rate books that the occupiers of the *Lakenheath Warren* had been rated in respect of it before the *Rating Act*, 1874 (37 & 38 Vict. c. 54).

Evidence was adduced as to the sufficiency of the common left, the effect of which is stated in the judgment of Mr. Justice *Fry*. During the trial the Plaintiff abandoned his claim to the fold-course in respect of the tenement called *Risley's*.

Southgate, Q.C., and *W. R. Fisher*, for the Plaintiff:—

1. If the Defendant had a right of approvement he must leave a sufficiency of common, which has not been done here; *Patrick* v. *Stubbs* (1). The *onus* is upon the lord to shew that he has done no damage: *Arlett* v. *Ellis* (2); *Lake* v. *Plaxton* (3). Damage is proved by the evidence in this case, which shews that the ingress and regress of the Plaintiffs' cattle is made more difficult, and that grass to a large extent has been destroyed for the purpose of digging gravel.

2. But in this case the Defendant is not lord of the soil; he only has a warren of conies, which is an incorporeal hereditament and carries no right of approvement: *Earl Beauchamp* v. *Winn* (4); *Comyn's* Digest (5); *Hoskins* v. *Robbins* (6); *Rice* v. *Wiseman* (7); and the cases which have arisen between a lord, owner of the soil, and a commoner entitled to sufficient pasturage over the soil, do not therefore apply to the present case.

3. The Defendant is clearly not entitled to extend the curtilage for the benefit of his shepherd: *Nevill* v. *Hamerton* (8). By the *Statute of Westminster the Second* (13 Edw. 1, st. 1), c. 46, only the curtilage of the lord may be increased.

Sir *H. Giffard*, S.G., *Joshua Williams*, Q.C., and *Vaughan Hawkins*, for the Defendant:—

1. The Plaintiff, as owner of the land, has only acted within his rights under the *Statute of Merton* (20 Hen. 3), c. 4, and *Statute of Westminster the Second* (13 Edw. 1, st. 1), c. 46, and 3 & 4 Edw. 6, c. 3; *Glover* v. *Lane* (9); *Filewood* v. *Palmer* (10); *Hall* v. *Byron* (11); *Lascelles* v. *Lord Onslow* (12); *Kirby* v. *Sadgrove* (13); *Cooper* v. *Marshall* (14).

2. As to the question whether the soil passed under the grant of the "warren of conies," all that *Earl Beauchamp* v. *Winn* decided was, that according to the circumstances of each particular

(1) 9 M. & W. 830.
(2) 7 B. & C. 346.
(3) 10 Ex. 196.
(4) Law Rep. 6 H. L. 223.
(5) Vol. iii. p. 73, Tit. Common.
(6) Pollexf. 13.
(7) 3 Bulst. 82.
(8) 1 Sid. 79.
(9) 3 T. R. 445.
(10) Mosely, 169.
(11) 4 Ch. D. 667.
(12) 2 Q. B. D. 433, 449.
(13) 1 B. & P. 13.
(14) Burr. 259, 265.

FRY, J.
1879
ROBINSON
v.
DULEEP
SINGH.

case the words might or might not pass the soil. In that case the soil did not pass; here we say it did: *Coke* upon *Littleton* (1); *Sheppard's* Touchstone (2). The fact that rates were paid in respect of the warren under statute 43 Eliz. c. 2, shews that the soil was always held to be in the owner of the "warren": *Eagle* on Tithes (3); *Stammers* v. *Dixon* (4). It is only by custom that tithes were paid in respect of rabbits: *Ball* v. *Robinson* (5). The proceedings in the *Dean and Chapter of Ely* v. *Stuart* shew that the lease to Sir *S. Stuart* was of the soil; a commission was directed to mark out the warren by metes and bounds: *Wake* v. *Conyers* (6).

[FRY, J.:—The question whether the soil or only a franchise had been granted was not there in dispute between the parties.]

Then various acts have been proved, such as the shooting of game by the lessees of the warren, which are consistent only with their being lessees of the soil.

3. As to the curtilage, *Nevell* v. *Hancerton* (7) shews that the right of the lord to extend a curtilage is not confined to the lord's own curtilage.

Fisher, in reply:—

Our evidence may be weak as to the possibility of ingress and egress from the Plaintiff's tenement to the warren, but it is not weak as to the destruction of the pasture by the gravel pits. Digging pits is not an approvement under the *Statute of Merton*. The digging of pits may endanger the commoner's beasts, for they may fall into them. The lord ought to inclose them: *Geo* v. *Cother* (8).

[FRY, J.:—The only decision there was as to the right to plead the general issue.

Hawkins referred to *Filewood* v. *Palmer* (9), where, in an action by tenants of a warren to restrain the lord from digging brick earth, Lord *King*, C., said that the Plaintiffs "must declare the

(1) 5 b, 117.
(2) Page 90; 4 Inst. 299.
(3) Vol. i. pp. 425, 426.
(4) 7 East, 200.
(5) 2 Eagle & Young, 289.
(6) 1 Eden, 331.
(7) 1 Lev. 62; 2 Inst. 476; 4 Inst. 298.
(8) Sid. 106; 1 Keb. 390, 453.
(9) Mosely, 169.

lord has not left them sufficient common, and he may prove and give in evidence they have sufficient."]

Elton on Commons (1); *Glover* v. *Lane* (2). The *Statute of Merton* was intended for the improvement of agriculture. Lord *Coke* says (3), commenting on the *Statute of Merton*, that "the lord could not approve by the order of the common law." If the Defendant relies, not on the *Statute of Merton*, but on the lord's reserved rights, it is not necessary that the Plaintiff should prove substantial damage: *Folkard* v. *Hemmett* (4).

[FRY, J.:—That was an action by a commoner against a stranger.]

The evidence, however, does prove substantial damage.

The inclosure round the *Warren Lodge* can only be justified if made for the purposes mentioned in the *Statute of Westminster the Second.*

[*Southgate* referred to *Pindar* v. *Wadsworth* (5).]

A curtilage means an inclosure about the house of the owner of the fee such as is reasonably necessary for its convenient use. *Patrick* v. *Stubbs* (6) does not shew that a tenant for years of a common has a right to inclose, and the head-note is wrong in saying that an owner *pur autre vie* may do so. *Glover* v. *Lane* shews that a tenant for a long term of years may inclose.

As to the demise, the proper construction is that only a franchise passed to the Defendant, and the decision in *Lord Beauchamp* v. *Winn* (7) ought to govern this case.

1879. May 27. FRY, J., after stating the nature of the action, continued:—

By the decision of the Court of Appeal it has been ascertained that the rights of fold or fold-courses claimed by the Plaintiff are rights of common appurtenant, and it has been further ascertained that such a right of common is a right against which approvement may take place under the *Statute of Merton.*

(1) Page 183, *et seq.*
(2) 3 T. R. 445.
(3) 2 Inst. 85.
(4) 5 T. R. 417, n.
(5) 2 East, 154.
(6) 9 M. & W. 830.
(7) Law Rep. 6 H. L. 223.

FRY, J.
1879
ROBINSON
v.
DULEEP
SINGH

With regard to the three fold-courses which are admitted or have been established several questions arise which I have now to determine. The first is this—Has the Defendant interfered with the enjoyment by the Plaintiff, as the owner of these three common rights, of the ingress, egress, and regress to and from *Lakenheath Warren* to which he was entitled under the *Statute of Merton?* In my opinion the evidence shews that he has not. [His Lordship referred to the evidence on this point.]

The next question is this—Has the Defendant left sufficient pasture for the Plaintiff as the owner of the three common rights of pasture? Upon that point the interference alleged is stated to result from the inclosure round the *Warren House,* which being originally but three and a half acres, has been increased to about seven acres, and from the turning over of the gravel-pits. The gravel-pits have existed to some extent for a great number of years. It has been proved that a space of about fifty or fifty-five acres has been more or less disturbed by the Defendant's operations. Since the year 1872 the Defendant has turned over about five acres of the old gravel-pits, and has dug fresh gravel-pits to the extent of about five or seven acres more. Taking the whole of the inclosure round the *Warren House,* and the whole of the ground in any way disturbed or affected by the digging of the gravel, it appears to me that only about a thirty-seventh or thirty-eighth part of the common has been in any way disturbed. It further appears that a considerable portion of that which has been inclosed near the *Warren Lodge* is not valuable for the purposes of common, and that the hill where the gravel has been dug was also not very valuable as common. Upon the whole I think that the Defendant has substantiated his defence, that there is sufficient common left for the purposes of the Plaintiff. It has been very truly said by Mr. *Vaughan Hawkins* that the experiment as to sufficiency or insufficiency has now been tried for some months, and there is no evidence on the part of the Plaintiff to shew that the common has proved insufficient, or that it has been less valuable to him, since the Defendant has carried on these operations than it was before he came into possession of the land.

It is said that different considerations apply to the inclosure and to the digging of gravel, and therefore I will make some observations upon them separately.

With regard to the inclosure, it is clear that the question arises under the *Statute of Merton*, and that, according to that statute, the lord may approve by inclosure if he leave sufficient common, with proper ingress, egress, and regress. In my judgment the Defendant has not, either by the inclosure round the *Warren House* or by the digging of gravel, interfered with the sufficiency of the common.

With regard to the digging of gravel, it is said that that is not within the *Statute of Merton*, because the space is not inclosed. But, assuming that to be so, and very probably the Plaintiff is right in that contention, it remains to be considered whether the lord may not dig gravel, provided he does not interfere with the substantial rights of the commoners. Now that point has been the subject of adjudication. It has been dealt with by Vice-Chancellor *Hall* in *Hall* v. *Byron* (1). The Vice-Chancellor then laid down the law thus (2): "The law I consider to be that the lord may take gravel, marl, loam, and the like, in the waste, so long as he does not infringe upon the commoners' rights, his right so to do being quite independent of the right of approvement under the *Statute of Merton* or at common law, and existing by reason of his ownership of the soil, subject only to the interests of the commoners. *Bayley*, J., in *Arlett* v. *Ellis* (3), said, 'The lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of commoners. And, when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes.'"

In this very case, when it was before the Court of Appeal, Lord Justice *James* seems to have taken the same view. There is further the case of *Filewood* v. *Palmer* (4), which seems to shew that Lord *King*, the Lord Chancellor of that day, took the same view with regard to the rights of the lord as to digging for brick-earth. Undoubtedly there is an *obiter dictum* of Mr. Justice *Windham* in *Geo* v. *Cother* (5), where he says: "The lord may not dig pits in

(1) 4 Ch. D. 667.
(2) Ibid. 675.
(3) 7 B. & C. 369.
(4) Mosely, 169.
(5) Sid. 106.

FRY, J. 1879 ROBINSON v. DULEEP SINGH.

the common into which the beasts of the commoner may fall." But that is a mere *obiter dictum*, and is to be found only in *Siderfin's* Report, and not in any other report of the case. It appears to me that I cannot hold as a universal proposition that no excavation can be made in the surface of the soil. A number of cases in which the lord has substantiated his right to dig earth would be a strong indication that I should be wrong in coming to that conclusion. In the present case, however, it must be borne in mind that this digging of gravel has gone on for a long series of years. More than forty years ago gravel was dug, and pits were made, and there is not the slightest evidence that any injury has been sustained by any sheep or commonable beasts by reason of the digging so carried on. This is not surprising, because, in the first place, the pits are not very deep, and have not very steep sides. That appears from the photographs which have been produced, and it is said that as a general rule the pits were filled up as the digging proceeded. Moreover, the diggings are in one corner of the common, a part which the beasts are not in the habit of frequenting, because the pasture in the neighbourhood is not inviting to them.

I come, therefore, to the conclusion that the lord in the exercise of his reserved rights is at liberty to dig this gravel, and that he has dug it without any substantial interference with the rights of the commoners.

This further question has been mooted. It is said that, even if I am wrong in my conclusion of fact with regard to the sufficiency of pasture which has been left, yet nevertheless the Defendant, as claiming under the lord of the manor, is entitled to make the inclosure round the *Warren Lodge* by virtue of the *Statute of Westminster the Second*, as an increase of the necessary curtilage. To that it has been replied that Lord *Coke's* commentary shews that the curtilage which may be increased is only the curtilage of the dwelling-house of the lord or other owner of the fee, and that he may not extend the curtilage of a house required for the purpose of a warrener. In reply to that, it has been said that the old case of *Nevell* v. *Hancerton* (1) shews that he may do it for his shepherd. It appears to me that it is not necessary to decide the difficult

(1) 1 Lev. 62.

question which arises upon the construction of that statute, but this I do find as a fact, that the extension of the curtilage of the warrener's lodge has been such as was proper and necessary for the purposes of the convenient use of that house and tenement by the warrener.

There remains another very serious and difficult question of construction. The Defendant claims under a lease and a grant of the reversion on that lease, and he says that by virtue of those two instruments he is the owner of the soil of the warren. The Plaintiff says that that is not so, but that those instruments convey the franchise of the warren and nothing more, and that therefore, as regards the freehold in the soil, the Defendant is a stranger, and nothing but a stranger, and consequently the decisions as between the lord or owner of the soil and commoners do not apply. It is, therefore, highly important to consider what the effect of the instruments is.

The first instrument is the lease of the 5th of November, 1866, which demises "all their" (that is the Dean and Chapter's) "warren of conies at *Lakenheath*, in the county of *Suffolk*, as it is there marked out and described by its proper metes, boundaries, and borders." My first inquiry is this, by what principle ought I to regulate myself in construing the words which I have read? The case of *Earl Beauchamp* v. *Winn* (1) has been relied on by both sides as furnishing a principle of construction in favour of their respective contentions. Lord *Coke* says, in a passage which was cited in that case, that as the words *stagnum* and *gurges* pass the soil, "so it is of a forest, park, chase, vivary, and warren on a man's own ground, by the grant of them, not only the privilege, but the land itself passes, for they are compound." Now it is to be observed that in this lease there is not the word "warren" *simpliciter*, but the words are "warren of conies," and it is no doubt more difficult to construe the words "warren of conies," as passing the soil, than it is so to construe the word "warren" itself. Lord *Colonsay* made this observation (2): "We have now to consider whether, as here introduced, it" (that is the word "warren") "did or did not carry the soil. If it was a name descriptive of a particular piece of land, and was so known as descriptive of that piece of

(1) Law Rep. 6 H. L. 223. (2) Law Rep. 6 H. L. 246.

FRY, J.
1879
ROBINSON
v.
DULEEP
SINGH.

land, it might carry it. It might be 'coney warren of *Bromby*,' meaning that piece of land known as the coney warren of *Bromby*. It would certainly carry the soil if the word 'land' had been introduced. Such a term as 'that cow park,' or any other description of that kind, might carry a certain piece of soil, but it does not follow from that that 'a warren of conies' would carry it. That is a very different thing." And Lord *O'Hagan*, in the same case, said (1): "The authorities are very few, and seem to me to result clearly in this, that the term 'warren' may, under certain circumstances and in certain collocations, be held to pass the soil, and in others it may not." From these passages and from the whole of the case, I conclude that I ought to look at two things in the construction of this instrument. I must first inquire what was the ordinary meaning and understanding of the expression "warren of conies at *Lakenheath*," at the time when the instrument was executed, and for that purpose I must look at the antecedent usage in the neighbourhood among the persons who were concerned in or conversant with the property in question, and then I must undoubtedly look at the whole context and frame of the instrument in which the words occur. What then was the local usage with regard to this expression? I have before me the proceedings in the litigation between the Dean and Chapter of *Ely* and Sir *Simeon Stuart*, which took place about the year 1740. It appears to me, however, that the question whether the lease of the warren which had been granted in 1715 to Sir *Simeon Stuart* did or did not carry the soil, was not a question in which Sir *Simeon Stuart* was interested, and further, that it is very difficult to say that there is any distinct admission or assertion by the Dean and Chapter that it did carry an interest in the soil. But I do find this, that in the decree itself the expression is used "warren and other lands," and that the Court directed commissioners "to distinguish and set out the boundaries of the warren and other lands," evidently using the expression "warren" to indicate the particular piece of land, as in fact it cannot be disputed that the expression "warren" was popularly used to distinguish a particular piece of land. The commission accordingly issued, and the commissioners reported that they had viewed the lands and pre-

(1) Law Rep. 6 H. L. 255.

mises therein referred to, and that they had set out the "coniger or warren of conies," an equivalent expression, which evidently in their certificate was intended to apply to a particular piece of land.

I have before me also the entries in the rate books of the parish, and I find that in 1771 the then lessee under the Dean and Chapter was rated for a warren of conies, and when I look at the acreage value assessed in the rate book for the warren of conies, I cannot doubt that it is the one now in question, or that the expression "warren of conies" was there used to describe the piece of land.

I come to that conclusion for this simple reason, that, from that time until the year 1874, what was liable to be rated under the statute 43 Eliz. c. 2, was land and houses and certain other particular properties, which certainly do not include a franchise, and that the *Rating Act*, 1874, for the first time made the right of taking conies, when held separately from land, subject to that taxation. The same description continues for several years, and I find that at thirty-eight intervals down to 1863, which were the intervals given to me, the rabbit warren has been in the same way subject to taxation for the poor, and the words have been therefore used apparently in the parish as describing a piece of land.

Therefore I approach the construction of the lease with this knowledge, that there was that which was known as the "warren of conies," and that that expression was used to describe a piece of land. But that is not of itself conclusive, because undoubtedly "warren of conies" might also express a franchise.

I proceed to consider the context of the instrument, and I find that, having demised the "warren of conies," the lessors proceed to demise "All those two several lodges, with the messuage or tenement to one of them adjoining, standing upon and within the said warren." No doubt, if the language had clearly meant a franchise, the "lodge standing upon the warren" would mean the lodge standing upon that land over which the right extended. At the same time it appears to me that the more natural construction of the words imports that that upon which the lodge stood was a corporeal and not an incorporeal thing. It stood upon the warren, and if it stood upon something corporeal, the warren was a corporeal, not an incorporeal hereditament.

FRY, J.
1879
ROBINSON
v.
DULEEP
SINGH.

Then comes a grant of the stock of conies upon the warren. I agree that that in itself is not conclusive, but at the same time it appears to me that that would be tautologous, if a franchise alone had been granted, whereas it is more intelligible and has more weight of meaning given to it if you suppose that the previous demise had been of the land, followed up by the grant of the animals which are upon the land.

Then there follows the grant of "all ways, easements, profits, commodities, and appurtenances whatsoever to the said warren belonging or appertaining," words which, I think, although perhaps they are not necessarily inconsistent with its being a grant merely of a franchise, are more consistent with its being a lease of the land.

[His Lordship then referred to the other clauses of the lease as above stated, and added:—]

Upon the whole reading of the instrument I have come to the conclusion, that, although each individual expression is probably capable of being applied to a franchise, yet that all the expressions taken together lead to the conclusion that a corporeal hereditament is being dealt with and demised rather than an incorporeal hereditament. Therefore, seeing that the words "warren of conies" were known as applicable to a piece of land in *Lakenheath* at the time of the demise, and that the context of the instrument favours the view that the intention of the lessors was to grant a corporeal hereditament, I conclude and hold that the lease did convey an interest in the soil.

I am confirmed in coming to that conclusion by the acts which it has been proved have been done by previous lessees under similar leases. Although those acts in themselves may not be very extensive, yet they throw some light upon the relative rights of the parties. I find previous lessees under similar leases, not only shooting partridges upon the warren, but planting trees, inclosing a portion of the warren, and constructing a grotto with a plantation round it on another part of the warren, acts which the lessee would be entitled to do if he were the lessee of the land with the right of taking the conies, but which he could not be justified in doing if he were the mere lessee of the incorporeal franchise.

The result is that, in my view, the Defendant is not to be treated as a stranger; his acts are not therefore to be measured by the strict rules which have been applied in cases of interference with the rights of commoners by a stranger, but he is entitled to those rights which exist at common law, and under the *Statute of Merton* for the approvement of land which is vested in the owner of the soil.

The grant from the Ecclesiastical Commissioners conveys to the Defendant the fee simple of everything which was vested in him by the lease, and therefore I think it unnecessary to make any detailed observations on the grant of the freehold.

The result is that, in my opinion, the Plaintiff has failed in his case, and I must dismiss the action with costs. But in so doing I think it desirable to make it clear that I do not reject the Plaintiff's claim to the three fold-courses, the right to which he has substantiated, and therefore I propose to express my judgment in these terms:—"The Court, being of opinion that the Plaintiff is entitled to three fold or fold-courses, sheep-walk, and rights of pasturage, as rights of common appurtenant to his tenement, for 300, 300, and 200 sheep respectively, and being further of opinion that the Defendant had done no act to interfere with those rights, dismisses the action with costs."

Solicitors for Plaintiff: *Carr, Davidson, Bannister, & Morriss.*
Solicitors for Defendant: *Farrer, Ouvry, & Co.*

C. A.
1879
FRY, J.
March 6, 7.
C. A.
May 29, 30.

SWANSTON *v.* TWICKENHAM LOCAL BOARD.

[1878 S. 438.]

Public Health Acts (11 & 12 *Vict. c.* 63, *ss.* 45, 46, *and* 38 & 39 *Vict. c.* 55)—*Construction of Sewers—Side-entrances or Man-holes—Compensation or Purchase.*

The Defendants, a local board of health, prior to 1875, constructed a sewer under a public footpath, the soil of which belonged to the Plaintiff, and they made a shaft thirty feet deep into the sewer, with an entrance or man-hole upon the footpath, at a point where there was a junction of two sewers. The Defendants also gave the Plaintiff notice after 1875 of their intention to make similar man-holes into their sewers upon other parts of the Plaintiff's property:—

Held, by *Fry*, J., that these entrances or man-holes were not such works as formed part of the sewer within the meaning of the Public Health Acts of 1848 and 1875, but that they were works connected with the sewer, which required to be made upon land to be purchased for the purpose.

Held, on appeal, that they were parts of the sewer within the meaning of 11 & 12 Vict. c. 63, s. 45, and could be made without purchasing land for the purpose; and that the Plaintiff was only entitled to compensation for the damage arising from making them.

THE Defendants, the Local Board for *Twickenham*, constructed a sewer under a public road in that parish known as the *Station Road;* and upon the pathway adjoining the road, which belonged to the Plaintiff and abutted upon other property belonging to the Plaintiff upon which a row of villas had been built, they before 1875 constructed a man-hole or side-entrance to the sewer. The man-hole consisted of a large brick shaft nearly thirty feet deep, covered at the top by a large iron plate. The Plaintiff, as it appeared, first discovered the existence of the man-hole in the month of October, 1878. The Defendants in that year served the Plaintiff with notice of their intention to erect two more such structures on his land in *Avenue Road*, a newly laid out road running into the *Station Road.*

The Plaintiff alleged that sewer gas escaped from the man-hole, and caused a nuisance to the Plaintiff's tenants of houses in the *Station Road* known as *Sherland Villas*, and he claimed an injunction to restrain the Defendants from continuing the said

structure or side-entrance to the sewer, and for a direction to the Defendants to remove it, and also an injunction to restrain the Defendants from constructing any other side-entrances to sewers on any part of the Plaintiff's land at *Twickenham*. He also claimed damages for the injury caused by the erection and continuance of the side-entrance.

In their defence the Defendants stated, and it was established by evidence, that it was essential to any proper system of sewers that man-holes should be provided, especially at all junctions of sewers, and that such man-holes were used, not for the purpose of bringing up sewage from them, but to enable workmen to descend to examine the state of the sewers. The man-hole in question was formed at the point where the sewer would be joined by another sewer about to be constructed under and along *Avenue Road*. The Defendants denied the allegations of nuisance, and alleged that if any damage was caused to the Plaintiff his remedy was to proceed under sect. 308 of the *Public Health Act*, 1875, and that the damage, if established, would be the subject of compensation under the provisions of that Act.

When the case came on upon motion for an injunction in the terms of the claim before Mr. Justice *Fry* on the 6th of March, 1879, it was arranged by consent that it should be taken as the hearing of the action.

Higgins, Q.C., and *E. J. Payne*, for the Plaintiff:—

We do not complain of the Defendants making the sewer as they have done, but what we complain of is, their making an entrance to the sewer upon our land. This sewer was made before 1875, therefore the case comes within the *Public Health Act* of 1848 (11 & 12 Vict. c. 63). The 45th section of that Act gives the local board power to make the sewer, but not to make a shaft thirty feet deep as an entrance to the sewer, and to come upon our land at all times to pass through the man-hole into the sewer. We have evidence to shew that the stench from the sewer escapes from the iron plate fixed over the entrance, and that sickness has been caused thereby, but the fact of the shaft being used as an entrance to the sewer, of itself shews that a nuisance must necessarily arise from the structure. By the 46th section of the same

C. A. 1879 SWANSTON v. TWICKENHAM LOCAL BOARD.

Act the Defendants might have made reservoirs, sluices, engines, and such other works as might be necessary for cleansing, clearing, and emptying the sewers; but this could only be done by the consent of the owner, or by purchasing the lands. This structure is not part of the sewer, but is a work which would come under the 46th section, as being necessary for cleansing and emptying a sewer; and we contend that the Defendants are bound to purchase the land required for such man-holes, and it is not a subject for compensation. It was held in *Sutton* v. *Corporation of Norwich* (1), that the local board in that case had no power to go upon land without the consent of the owner, for the purpose of making reservoirs and deposit beds, under the 46th section, for retaining the sewage. The same principle was laid down in *Hughes* v. *Metropolitan Board of Works* (2). In *Roderick* v. *Aston Local Board* (3), it was held that the board might make a sewer across the Plaintiff's pleasure-ground upon making compensation; but there the Plaintiff retained the surface of the land. Here they claim a right to the perpetual use of the surface.

The Defendants have given us notice of their intention to make two other man-holes or entrances into a sewer in another part of our property. That will come under the Act of 1875 (38 & 39 Vict. c. 55), but the same arguments will apply, since there are in the 15th and 16th sections of that Act powers similar to those given by the Act of 1848. But in the later Act power is distinctly given by the 175th section to purchase any private property which may be required for the construction of works connected with the sewer apart from the sewer itself.

[FRY, J., intimated to the counsel for the Defendants that he did not require to be addressed upon the question of nuisance or the dedication of this path to the public, but only as to the necessity there was for the construction of the side-entrance or man-hole, and as to the right of the Defendants, to erect the structure without purchasing the land.]

J. Pearson, Q.C., and *Vaughan Hawkins*, for the Defendants:—

The 46th section of the Act of 1848 provides that the sewers constructed under the Act shall be kept so as not to be a nuisance

(1) 27 L. J. (Ch.) 739. (2) 9 W. R. 517. (3) 5 Ch. D. 328.

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or injurious to health, and to be properly repaired, cleansed, and emptied, and for that purpose the board may construct such works as may be necessary. We are therefore compelled to repair, cleanse, and empty the sewers, and for that purpose it is necessary to have proper entrances. A man-hole is absolutely requisite for the purpose of examining the sewer, and more particularly at the junction of two sewers which will take place at the point where this entrance is made. The entrance is, in fact, part of the sewer, and is absolutely requisite for carrying out the Act. The case of *North London Railway Company* v. *Metropolitan Board of Works* (1) is an authority for holding that any works which are necessary in making a sewer may be constructed upon giving compensation for the damage occasioned. The Plaintiff has no right to come for an injunction to restrain us from doing what the Act requires us to do, but he should proceed under the 144th section of the earlier or the 308th section of the latter Act for obtaining compensation, if he can prove any damage to have been sustained.

FRY, J. :—

The Plaintiff seeks to restrain the Defendants from continuing a certain structure described as a side-entrance to a sewer in a road known as the *Station Road*. He also asks for an injunction to restrain the construction of other side-entrances to deep sewers on any part of his land.

The two cases as to the *Station Road* and the other land of the Plaintiff require separate consideration, for this reason, that the one is under the Act of 1875, and the other is affected by the earlier Act of 1848.

It appears that the side-entrance in the *Station Road* is upon a strip of land running along the front of a row of villas which belong to the Plaintiff, and really constitutes a footpath by the side of the *Station Road*. That footpath has been asphalted or gravelled, and for eight or ten years it has been used by the public without interruption. It appears to me to be plain that it was dedicated to the public as part of the building scheme of the Plaintiff; and the public have passed over it with the consent of the Plaintiff. I infer that consent not merely from the building

(1) Joh. 405. 5 Jur. N.S. 1121

C. A. 1879 SWANSTON v TWICKENHAM LOCAL BOARD. Fry, J.

scheme, but from the fact that some parts of the property have been in his hands as lessor since the buildings have been erected, and have been redemised by him in a manner which shews that all he intended to demise was the inclosure, leaving therefore this open space dedicated to the public. So much for the facts as to the position of this side-entrance.

The law with regard to this side-entrance in *Station Road* depends upon the *Public Health Act* of 1848, under which the Defendants were acting at the time they made it, which was in April, 1875. Now there are four sections in the Act which require to be attended to. The first is the 45th, which enacts that the Local Board of Health may "cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act;" and they "may carry any such sewers through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage way of any street, and, after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary), into, through, or under any lands whatsoever;" and then follows a power to "enlarge, lessen, alter, arch over, or otherwise improve all or any of the sewers vested in them by this Act, and discontinue, close up, or destroy such of them as they may deem to have become unnecessary." The 46th section enacts "That the Local Board of Health shall cause the sewers vested in them by this Act to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place either above or underground such reservoirs, sluices, engines, and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but so as not to create a nuisance." The 84th section gives the Local Board power to take lands by agreement, and the 144th section provides full compensation for the damage sustained by any person by the exercise of the powers given to the Board of Health.

Now the 45th and 46th sections require particular attention. They authorize the construction of a sewer, and that sewer may be constructed either in a street or through any land, and, therefore, the same power applies to private and inclosed lands as applies to streets. It is no larger in the one case than in the other; with this exception, that, in the one case notice is required, and a report is required also before the notice is given. It is said in this case that the notice was insufficient. In my opinion that question does not arise, because, looking at the expressions here used with regard to "street," it appears to me that the *locus in quo* of this side-entrance was either a street or a place laid out as or intended for a street. In coming to that conclusion I bear in mind the definition of "street" given in the 2nd clause of the Act of Parliament, which says that "the word 'street' shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley," and so forth. It appears to me, as I have already indicated, that the spot in question is dedicated to the public, and is a footway. Therefore the question upon the sufficiency of the notice does not arise.

The next point which requires consideration is the meaning of the expression "sewer." Now that also is the subject of definition. The word sewer is defined to "mean and include sewers and drains of every description except drains to which the word 'drain,' as interpreted aforesaid, applies." I am bound to say that that provision does not appear to me to throw very much light upon the case. But this is to be observed, that the word "sewer," as defined, is not in any way extended—that is to say, nothing incident to or appurtenant to the sewer is said to be included in it: it is the sewer simply, and nothing but the sewer. Of course whatever was necessary for the sewer is included in the word; whatever may be merely convenient or an accessory, not absolutely necessary, is not by any provision brought within the scope of the word. Then the 46th section must be contrasted with the 45th, because that enables the Board of Health, for the purpose of clearing, cleansing, and emptying the same, to construct such reservoirs, sluices, engines, and other works as may be necessary. It appears to me, therefore, there is a distinction drawn between

C. A. 1879

SWANSTON v. TWICKENHAM LOCAL BOARD.

Fry, J.

the sewer and nothing but the sewer on the one hand, and those works which may be necessary for clearing and emptying it on the other hand. My opinion is that a sewer, and nothing but a sewer, may be made through any man's land, whereas the other works which are necessary are not to be made through the land of a private individual unless that land is acquired under the power of purchasing with which the Board of Health is clothed. It is said, and no doubt truly said, that the Board of Health may be exposed to difficulty from that construction; but it appears to me it would be a very strong conclusion to come to, that the Board of Health might make such reservoirs and such engines and sluices on the private land of any man, simply compensating him for the injury done. I think that if that had been the intention the Act would have said so. The power is expressly given in the case of a sewer, but not in the case of other works; and power is given to acquire land by purchase. The inference, therefore, to my mind is strong that a sewer may be made on any inclosed private land or any street by simply compensating the owner of the land; but with regard to other works the board must so contrive their plans as to be able to carry them into effect upon land which they can acquire by purchase. I may observe that the difficulty which that construction leads to, namely, the possibility of the board not being able to find suitable land, has been provided for by the Legislature in the Act of 1875, because there the power is given to take lands by compulsion.

Now what is the structure in the present case? It is a side-entrance or man-hole; it is a shaft of some thirty feet elevation, beginning at the point of junction of the sewer in question and coming to the surface of the ground. It has been there placed for the purpose of enabling men to descend into the drains with the view of seeing what may be necessary for the purpose of clearing, cleansing, and emptying the same. Is that the kind of sewer mentioned in the 45th section, or is it a work under the 46th section? Upon looking at the evidence of the surveyor of the Defendants, it appears to me that it is the second. According to his statement, it appears to be the common practice of the board to place these works at the points of junction of their sewers, and nowhere else. It does not appear to me, therefore,

that it is strictly part of the sewer, though it may be very necessary as part of the general works of drainage which the Board of Health is entitled to carry into effect.

The inconvenience of supposing that these man-holes may be made upon a man's private land is very considerable, because it is apparent that if the Act of Parliament has given the power to make a man-hole, it has given the power to approach the man-hole, in order that the men may go down it; and therefore the result would be that the board would have a right to make a sewer upon the private land of any landowner, and to place on various spots of that sewer a series of man-holes, over which the landed proprietor would never be able to build; and you must infer a right of access to these man-holes in perpetuity. I quite agree, if the Act of Parliament says so, I should have no hesitation in following it upon giving the landlord compensation; but is that the conclusion that I ought to arrive at, or is it clear upon the Act of Parliament? To my mind it is not. The result, as it appears to me, is, that the Board of Health, under the 45th section, had no power to construct this work, unless they first purchased the land of the Plaintiff.

It is next said that the Plaintiff has acquiesced in the construction of these works, and that he has debarred himself from the right he otherwise would have had. It appears that this work was completed in April, 1875, but it further appears that the surface of the man-hole was covered—it was covered with gravel, and it was not apparent to the Plaintiff, and in the result he swears, and I believe what he says, that he did not know of the existence of the structure. It is impossible for me, under the circumstances, to conclude that he has so acquiesced in what the Defendants have done that he has lost the rights he would otherwise possess.

Then the Plaintiff has undoubtedly come upon another ground, namely, the ground of nuisance. I did not call upon the Defendants to address me upon that, because it was impossible for me to attend to the evidence respecting it. The evidence merely speaks in general terms of the nuisance being created, but does not give any particulars of the amount, of the duration, or the extent of time, or space of the smell constituting the nuisance

C. A. 1879

SWANSTON v. TWICKENHAM LOCAL BOARD.

FRY, J.

complained of. Therefore I reject that. Upon the Act of Parliament, I feel bound to hold the Defendants have committed a technical trespass upon the soil of the Plaintiff in this street. It is not disputed that the soil is in him, although subject to the right of way. The result must be that I must grant an injunction to restrain the Defendants from continuing that side-entrance; but I shall certainly suspend the injunction for a considerable period. I think that I ought to suspend it for at any rate six months, in order to give the Defendants the power of acquiring the land from the Plaintiff, either by agreement or under the compulsory powers with which they are now clothed.

The next question I have to determine is with regard to other side-entrances on other parts of the Plaintiff's land. Notice with regard to these was given in the year 1878; that, therefore, is regulated, not by the Act of 1848, to which I have referred, but by the more recent *Public Health Act* of 1875. The sections which relate to the question in controversy are these—there is the 16th, which is substantially the same as the 45th section in the earlier Act, and that authorizes the local authority to "carry any sewer through, across, or under any turnpike road, or any street or place laid out as or intended for a street," and so on, after giving reasonable notice in writing to the owner or occupier. It appears that notice has been given in this case, and the notice was that they would construct a sewer through the private land of the Plaintiff, and would construct two side-entrances on that private land. The 175th section gives power to take private land either by agreement or compulsion; and the 318th section creates a liability to make full compensation. The observations I have made as to the construction I put upon the word "sewer" apply substantially to this case, and lead me to conclude that all the Defendants can do upon the Plaintiff's land without obtaining the Plaintiff's consent or purchasing, is the construction of sewers simply, and does not include the side-entrance. I say the observations apply substantially, because there is no clause precisely identical with the 46th to be found in the recent Act, but the 19th provides that "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be pro-

perly cleansed and emptied"; and the 27th provides that for the purpose of receiving, storing, disinfecting, distributing, or otherwise disposing of sewage, any local authority may construct any works." Those appear to me to have in substance the same effect as the 46th section of the earlier Act. I cannot, upon the ground of any difference—a mere difference in the phraseology of the Act—extend the meaning which I have put upon the word "sewer."

From what I have said it is apparent that I do not determine, as a universal proposition, that a side-entrance may not be part of a sewer; but finding that in this case the scheme of the Defendants' engineer has been to erect side-entrances only where there are junctions, and that they are not necessary for a mere sewer, I hold that the Defendants have not a right to construct these side-entrances of which they have given notice, except by the consent of the Plaintiff or after the purchase of the land in question. Therefore there must be an injunction also in the second case, restraining them from making the side-entrances unless and until they have acquired a right in the land. Of course, after this decision the Defendants must pay the costs of the action.

With regard to the *Station Road*, I grant an injunction to restrain the Defendants from continuing the man-hole, but that injunction is not to take effect until after the expiration of six months. As to the second part of the claim, I restrain the Defendants from making the side-entrance unless and until they shall acquire a right to do so.

C. A.

The Defendants appealed. The appeal came on to be heard on the 29th of May.

J. Pearson, Q.C., and *Vaughan Hawkins*, for the Appellants:—

The man-holes or side-entrances are necessary parts or accessories of the sewer, and the Appellants were authorized to make them under the 45th section of the *Public Health Act*, 1848. They are not within the class of "necessary works" for cleaning the sewer referred to in sect. 46. The sewer cannot be made without them. A sewer includes more than the mere barrel. In the interpretation clause of the *Public Health Act*, 1848, s. 2, it is

C. A. 1879 SWANSTON v. TWICKENHAM LOCAL BOARD.

defined to include "sewers and drains of every description," except drains to a single house, and everything essential to a sewer must be considered as part of the sewer; that would include the side-entrances. The grating over a sewer has been held to be part of the sewer: *White* v. *Hindley Local Board* (1).

As regards the side-entrances intended to be made, the Appellants have power to make them under the *Public Health Act*, 1875, ss. 16, 19, 27, 175, 308, subject to the Plaintiff's right of compensation: *North London Railway Company* v. *Metropolitan Board of Works* (2).

[During the argument of the Appellants, Mr. *Ramsay*, the engineer of the Board of Works, was examined in Court, and stated that the man-holes could not be put in the roadway from the risk of injury to horses. He also said that when, as here, the man-holes were at a junction of two sewers, the men usually went down about once a week; but where they were not at a junction, they were only opened about once in three months.]

Higgins, Q.C., and *E. J. Payne*, for the Plaintiff:—

The footpath is the Plaintiff's land. There has been no dedication of it to the public. It is no part of the street within the meaning of the Act: *Taylor* v. *Corporation of Oldham* (3); *Wood* v. *Veal* (4). The man-hole is no part of the sewer. The sewer is only the barrel: *Sutton* v. *Corporation of Norwich* (5).

BRETT, L.J.:—

I am very sorry to say that I cannot agree with the decision of Mr. Justice *Fry* in this case.

It seems to me that what we have to determine is whether within the meaning of either statute these man-holes are parts of a sewer. I cannot, with regard to the question that we have to decide, see any difference between the two statutes. They seem to be substantially identical, except that in the second there is a power of compulsory purchase.

(1) Law Rep. 10 Q. B. 219.
(2) Joh. 405.
(3) 4 Ch. D. 395.
(4) 5 B. & A. 454.
(5) 27 L. J. (Ch.) 739.

Now as regards the side-entrance which the Defendants made in April, 1875, at which time they were acting under the *Public Health Act* of 1848, the making such an entrance either is within the 46th section, or is within the 45th section, or is not within the statute at all. Now, can it be a *casus omissus?* Such an entrance is the means of getting into that part of the sewer which requires cleaning.

The statute enacts that the persons who have to deal with these sewers shall keep them clean, and is it to be supposed that the statute, although it insists that they shall be kept clean, has omitted to give the board the means of getting to them in order to clean them? That would be a monstrous conclusion. Then, if the case is within the statute, it is either within the 45th section or within the 46th section. The 46th section provides that the board may, for the purpose of cleaning, cleansing, and emptying the sewers, construct such sluices, engines, and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary. How can it be said that a man-hole is a work which is necessary for clearing, cleansing, or emptying a sewer, or which causes all or any of the sewers to communicate with and be emptied into the place which is fit and necessary? It is plain to my mind that it is not within the 46th section. Then it follows logically, as it seems to me, that it is within the 45th section. It is a shaft. It is not used for the purpose of passing sewage through it, but it is built structurally as part of the sewer, and for the purpose of making the sewer more effectively a sewer. It is said that it is only put at the junctions. That is not true. It is wanted more at junctions than at other places; but if there were no junctions in the drains all through the system, it would be necessary to have man-holes in order to get at the drain for the purpose of cleansing it. This man-hole was built for that purpose, and therefore it is structurally, as it seems to me, part of the drain, although no part of the sewage is made to go through it. If that is so, it is within the terms of the 45th section, and it is a part of the sewer. Mr. Justice *Fry* has held that it is not a part of the sewer, but is a work within the 46th section, and that for all works within the 46th section there must be the

C. A. 1879 SWANSTON v. TWICKENHAM LOCAL BOARD.

purchase of land before these works are made. On the point whether land must be purchased for the purpose of reservoirs, sluices, engines, and works such as are described in the 46th section, or whether the construction of them merely gives a right to compensation, I desire to give no opinion on the present occasion. It is not necessary to decide that question, because we hold that the present case is within the 45th section, and it is clear to my mind that the only right which the person has who is injured by anything done under the 45th section is compensation. The Plaintiff, therefore, is not entitled to the order which has been made by Mr. Justice *Fry*, but only to compensation.

COTTON, L.J.:—

I am of the same opinion. It is no doubt true that the existence of a man-hole may cause greater inconvenience to a person whose property adjoins a sewer, or through whose property the sewer is made, than if the sewer had had at that place no man-hole; but the greater or less inconvenience is not an argument which can prevent us from putting a reasonable construction upon the words used in the Act of Parliament, especially when we consider that there is in the Act of Parliament a provision (sect. 144) for giving compensation to any one who is injured by the exercise of the powers of the Act. I do not think it can be contended for a moment that that does not apply to any inconvenience arising from and in consequence of the construction of a man-hole when the man-hole is made in exercise of the powers given by the Act.

The question we have to consider is in substance this, whether a man-hole comes within the 45th section or the 46th section of the Act of 1848. There is a substantial difference between the sections. I do not see in sect. 46 anything which gives power to the local board to make the works there pointed out in the soil and land of another person. That section does not, like the 45th section, contain words enabling the board to do what is there referred to in any land whatever, but only gives a general power to do certain things, and the fair construction of that appears to be that the section authorizes them to do certain things, and to apply for that purpose the funds at their disposal, but does not

enable them to do those things upon another man's land without buying it. On the other hand, the 45th section expressly gives power to carry a sewer into, through, or under any lands whatsoever. The substantial question, therefore, is whether a man-hole comes within the 45th or the 46th section; and I think that it is not within sect. 46, but within sect. 45. Giving a reasonable construction to the word "sewer," I think that the man-hole is clearly part of the sewer, as being necessary to a sewer properly made, and ought not to be looked upon as a work auxiliary to the use of the sewer. This obviates the necessity of the board buying the land, but leaves them liable to the clause of the Act of Parliament which obliges them to pay compensation. The two Acts are precisely the same, and therefore it is not necessary to deal with the Act of 1875, and the question of the *Avenue Road* sewer separately from the other question.

JAMES, L.J.:—

For certain reasons I have not given a judgment in this case, but I may say that I have heard it all through, and I entirely concur in the judgments which have been delivered.

After some discussion as to the proper form of order, the following order was made:—

The Court being of opinion that the Plaintiff is entitled only to compensation for such damage, if any, as he may sustain by reason of the exercise of the powers of the Act in the construction of the sewer and man-hole, dismiss the action with costs, including the costs of the appeal.

Higgins, Q.C., then asked the Court to frame its order so as to keep alive its jurisdiction pending an appeal to the House of Lords, so that the Plaintiff might be able to apply to keep things in *statu quo* pending the appeal: *Galloway* v. *Corporation of London* (1).

COTTON, L.J.:—

In that case the Plaintiff, if he had succeeded on appeal to the House of Lords, might have sustained irreparable injury by

(1) 3 D. J. & S. 59.

C. A. 1879 SWANSTON v. TWICKENHAM LOCAL BOARD.

having had his house pulled down in the meantime. Here, if the House of Lords reverses our decision, the man-hole must be filled up, and your land will be as good as ever. If our jurisdiction were kept alive, and you applied to stay the execution of our order, we should refuse to do so.

The order therefore was made as above.

Solicitor for Plaintiff: *W. H. Thompson.*
Solicitors for Defendants: *Wright & Pilley.*

C. A. 1878 M. R. *May* 31. C. A. 1879 *June* 13, 14, 16; *July* 1.

STURGES *v.* BRIDGMAN.

[1877 S. 223.]

Easement—Noise—Prescription—Prescription Act (2 & 3 *Will.* 4, c. 71)—*User—Affirmative and Negative Easements.*

User which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement. And this is applicable both to affirmative and negative easements.

On this principle the right to make a noise so as to annoy a neighbour cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance.

In considering whether any act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one locality might not be so in another.

A confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nuisance and were not complained of. But in 1873 the physician erected a consulting-room at the end of his garden, and then the noise and vibration became a nuisance to him. He accordingly brought an action for an injunction:—

Held (affirming the decision of *Jessel*, M.R.), that the Defendant had not acquired a right to an easement of making a noise and vibration, and the injunction was granted.

THE Plaintiff in this case was a physician. In the year 1865 he purchased the lease of a house in *Wimpole Street, London,* which he occupied as his professional residence.

Wimpole Street runs north and south, and is crossed at right angles by *Wigmore Street.* The Plaintiff's house was on the west side of *Wimpole Street,* and was the second house from the north

side of *Wigmore Street*. Behind the house was a garden, and in 1873 the Plaintiff erected a consulting-room at the end of his garden.

The Defendant was a confectioner in large business in *Wigmore Street*. His house was on the north side of *Wigmore Street* and his kitchen was at the back of his house, and stood on ground which was formerly a garden and abutted on the portion of the Plaintiff's garden on which he built the consulting-room. So that there was nothing between the Plaintiff's consulting-room and the Defendant's kitchen but the party-wall. The Defendant had in his kitchen two large marble mortars set in brickwork built up to and against the party-wall which separated his kitchen from the Plaintiff's consulting-room, and worked by two large wooden pestles held in an upright position by horizontal bearers fixed into the party-wall. These mortars were used for breaking up and pounding loaf-sugar and other hard substances, and for pounding meat.

The Plaintiff alleged that when the Defendant's pestles and mortars were being used the noise and vibration thereby caused were very great, and were heard and felt in the Plaintiff's consulting-room, and such noise and vibration seriously annoyed and disturbed the Plaintiff, and materially interfered with him in the practice of his profession. In particular the Plaintiff stated that the noise prevented him from examining his patients by auscultation for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention.

The use of the pestles and mortars varied with the pressure of the Defendant's business, but they were generally used between the hours of 10 A.M. and 1 P.M.

The Plaintiff made several complaints of the annoyance, and ultimately brought this action, in which he claimed an injunction to restrain the Defendant from using the pestles and mortars in such manner as to cause him annoyance.

The Defendant stated in his defence that he and his father had used one of the pestles and mortars in the same place and to the same extent as now for more than sixty years, and that he had used the second pestle and mortar in the same place and to the

C. A. 1879 STURGES v. BRIDGMAN.

same extent as now for more than twenty-six years. He alleged that if the Plaintiff had built his consulting-room with a separate wall, and not against the wall of the Defendant's kitchen, he would not have experienced any noise or vibration; and he denied that the Plaintiff suffered any serious annoyance, and pleaded a prescriptive right to use the pestles and mortars under the 2 & 3 Will. 4, c. 71.

Issue was joined, and both parties went into evidence. The result of the evidence was that the existence of the nuisance was, in the opinion of the Court, sufficiently proved; and it also appeared that no material inconvenience had been felt by the Plaintiff until he built his consulting-room.

The action came on for trial before the Master of the Rolls on the 31st of May, 1878.

Waller, Q.C., and *S. Dickinson*, for the Plaintiff, contended that noise should be put in the same category as light and air, and the Defendant had not acquired a prescriptive right to interfere with the Plaintiff's enjoyment of his own property. They cited *Webb* v. *Bird* (1); *Angus* v. *Dalton* (2); *Moore* v. *Rawson* (3); *Ball* v. *Ray* (4).

Chitty, Q.C., and *Method*, for the Defendant, contended that he had acquired an uninterrupted right to use his mortars as he had done; that the nuisance, if it was in fact a nuisance, had been legalised by prescription; and that, if necessary, a lost grant might be presumed. They cited *Flight* v. *Thomas* (5); *Wright* v. *Williams* (6); *Elliotson* v. *Feetham* (7); *Bliss* v. *Hall* (8); *Bealey* v. *Shaw* (9); *Baxendale* v. *McMurray* (10); *Cross* v. *Lewis* (11); *Crump* v. *Lambert* (12).

JESSEL, M.R.:—

I think this is a clear case for the Plaintiff. There is really no

(1) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841.
(2) 3 Q. B. D. 85.
(3) 3 B. & C. 332.
(4) Law Rep. 8 Ch. 467.
(5) 11 A. & E. 688; 8 Cl. & F. 231.
(6) 1 M. & W. 77.
(7) 2 Bing. N. C. 134; 2 Scott, 174.
(8) 4 Bing. N. C. 183; 5 Scott, 500.
(9) 6 East, 208.
(10) Law Rep. 2 Ch. 790.
(11) 2 B. & C. 686; 4 D. & R. 234.
(12) Law Rep. 3 Eq. 409.

dispute as to this being a nuisance; in fact, the evidence is all one way, and, as has been often said in these cases, the Plaintiff is not bound to go on bringing actions for damages every day, when he is entitled to an injunction.

The only serious point which has been argued for the Defendant is that by virtue of the statute, or by prescription, he was entitled as against the Plaintiff to make this noise and commit a nuisance. Now the facts seem to be that until a very recent period it was not a nuisance at all. There was an open garden at the back of and attached to the Plaintiff's house, and the noise, it seems, if it went anywhere, went over the garden, and, of course, was rapidly dispersed; as far as I can see upon the evidence before me, there was until a recent period no nuisance to anybody —no actionable nuisance at all. The actionable nuisance began when the Plaintiff did what he had a right to do, namely, built a consulting-room in his garden, and when, on attempting to use the consulting-room for a proper purpose, he found this noise too great for anything like comfort. That was the time to bring an action for nuisance.

Now, under those circumstances, it appears to me that neither the defence of the statute, nor the defence of the right by prescription, can possibly avail. I pass over technical grounds, for it appears that in fact both the Plaintiff and the Defendant are lessees under the Duke of *Portland*, the Defendant having a lease in 1845 and the Plaintiff in 1854. On what theory of law I am to presume a grant as against the Duke of *Portland's* lessee I do not know.

I will state the authorities as shortly and in as few words as I can. There are a great many authorities on the subject, but there is one authority which I have been looking at for another purpose, to which I shall refer. That is the case of *Webb* v. *Bird* (1), which states the law as explicitly as it possibly can be stated. There Justice *Wightman*, who delivered the judgment of the Court, says (2), "We think, in accordance with the Court of Common Pleas, and the judgment of the House of Lords in *Chasemore* v. *Richards* (3), that the presumption of a grant from long-

(1) 13 C. B. (N.S.) 841. (2) 13 C. B. (N.S.) 843.
(3) 7 H. L. C. 349.

C. A. 1879 STURGES v. BRIDGMAN. Jessel, M.R.

continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant."

Now in the case before me that was simply impossible. The noise was made on the Defendant's own premises—in his kitchen. Of course you could not go into his kitchen without being a trespasser. You could not interrupt it there, nor could you interrupt it on your own land, because you had no control over the waves of sound; nor could you even have interrupted it by an action, because there was originally no actionable nuisance. It did not hurt anybody as long as the Plaintiff's premises remained as a garden. It did not hurt anybody until the room was built. Therefore it is quite plain that independent of the technical ground, namely the fact of there having been two leases, there would have been no ground for presuming a grant. That puts an end to any notion of prescription.

Then the only other question is whether the Defendant can claim any defence under the statute. The 2nd section of the statute (2 & 3 Will. 4, c. 71) says, "That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, ... to be enjoyed or derived upon, over, or from any land . . . . when such way or other matter . . . . shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated."

Now I get rid of this claim at once by saying that, from its nature, I do not presume a lost grant. So that the statute really has no application at all. It seems to me it is quite unnecessary to discuss the question; but inasmuch as the case may possibly be taken elsewhere, I think it just as well to give my reason for saying why the 2nd section of the statute can have no application, and that is this: the easement there referred to is an easement to be enjoyed or derived "upon, over, or from" the land of the servient tenement. That is what it means; and it is to be

actually enjoyed by a person claiming a right without interruption for the full period of twenty years.

There are really all sorts of difficulties in the Defendant's way. In the first place the easement must be an easement "*upon, over,* or *from.*" Now the noise in question, in my opinion, is not properly described in that way. No doubt the waves by which the sound is distributed pass over the Plaintiff's land; there is no question about that. But is that an easement enjoyed "*upon, over,* or *from* any land?" Well, I think it is not. That appears not only from the natural meaning of the words, but from authority.

In the report of *Webb* v. *Bird* (1), Lord Chief Justice *Erle* says, "I do not think the passage of air over the land of another was or could have been contemplated by the Legislature when framing that section." Now, what he means by the passage of air is the passage of air in motion, the waves of air; for the ground of action in that case was wind: that is, what was wanted was not the air but the wind, for still air would have been of no use. The Plaintiff complained that his windmill would no longer turn, and therefore he claimed a right to the passage of air in motion. Then the Lord Chief Justice proceeds: "They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner if the right were disputed." Then he goes on to say: "I am clearly of opinion that the 2nd section of the statute meant to include only such easements upon or over the surface of the servient tenement as are susceptible of interruption by the owners of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right." Then in another passage he says, "The Legislature evidently considered the passage of light—which bears a very close analogy to that of air—to stand upon a different footing from the other easements with which it had been dealing in the preceding section; and, if it had intended to extend the right to the uninterrupted passage of wind and air, it would have done so in express terms."

Now it must be recollected that all the Defendant claims here

(1) 10 C. B. (N.S.) 268, 282, 283.

C. A. 1879 STURGES v. BRIDGMAN. Jessel, M.R.

is a right to the uninterrupted passage of air or ether—nothing else. He claims the right of setting the air or ether in motion by something or other that he does upon his own property.

It is exactly, therefore, within the principle as laid down by Chief Justice *Erle*, as a case to which the Act does not apply. But Mr. Justice *Willes*, in the same case, put it very plainly; and what he says applies both to the Act of Parliament and to the presumption of lost grant or prescription. He first of all says (1), "That which is claimed here amounts to neither more nor less than this—that a person having a piece of ground, and building a windmill upon it, acquires by twenty years' enjoyment a right to prevent the proprietors of all the surrounding land from building upon it, if by so doing the free access of the wind from any quarter should be impeded or obstructed." It comes to the same thing here. It prevents a man building upon it so as to enjoy his building. "It is impossible to see how the adjoining owners could prevent the acquisition of such a right except by combining together to build a circular wall round the mill within twenty years. It would be absurd to hold that men's rights are to be made dependent on anything so inconvenient and impracticable." Then he says, as regards light, "All that can be said, however, of these cases, is, that, as compared with the general law, they are anomalous. In general,"—and this applies, as I said, to lost grants—"a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense."

That puts the thing, if I may so say, on what is really a sensible ground. If a man has a noisy business in the middle of a barren moor which belongs to somebody else to whom the business carried on does no injury, the owner of the moor cannot bring an action and he cannot interrupt. Take the case of putting a blacksmith's forge in the middle of a moor: you cannot enter the blacksmith's forge, inasmuch as that belongs either to him or to his landlord, and the owner of a moor which has no game upon it has nothing which can be injured by the noise. There is no remedy whatever,

(1) 10 C. B. (N.S.) 284.

because it is a barren moor. Presently, this which is useless as a barren moor becomes available for building land by reason of the growth of a neighbouring town: is it to be said that the owner has lost the right to this barren moor, which has now become worth perhaps hundreds of thousands of pounds, by being unable to build upon it by reason of this noisy business? The answer would be simply, "I could not stop you: I could not interrupt. It is physically impossible, because it would be a trespass; legally impossible, because I had suffered no damage and could not maintain an action. How could you therefore acquire a right to deprive me of the fair and ordinary use of my property?" That seems to me to be an answer to all the cases put. You must have regard to the position of the property and all the surrounding circumstances to see if you can presume any grant. A man cannot presume a grant of that to which, so far as he is concerned, he has no right. You have no occasion to presume a grant. It is not a license to use a thing, because the use does not injure you. When you find a man doing an act which is a manifest injury to another, such as fouling a stream by pouring the refuse of a manufactory into the bright trout stream of his neighbour, and his neighbour allows that to go on for a great number of years, it is not unreasonable to presume that he did it under some right. If he has done it openly and his neighbour does not complain of that injury, although it is a very serious injury, it is not unreasonable to suppose that they did come to terms at some antecedent period for granting a right. But here, in the case I have before me, I cannot see a pretence for it. The fact that the man has made a noise which has not injured me or interfered with my comfort or enjoyment in any way, cannot deprive me of my right to the land, or interfere with my right to come to the Court when it does seriously interfere with my comfortable enjoyment.

It seems to me that, neither on the theory of lost grant nor on the statute, can the Defendant claim to do what he has done, and therefore the Plaintiff is entitled to an injunction; but as it would be somewhat hard upon a confectioner to alter his mode of business at the height of the *London* season, I will give him a reasonable time, say until the 1st of August, to alter the position of his mortars.

C. A. 1879 — STURGES v. BRIDGMAN.

From this decision the Defendant appealed. The appeal came on to be heard on the 13th of June, 1879.

Chitty, Q.C., and *Method*, for the Appellant:—

In the case of analogous easements it has always been laid down that a right is acquired by twenty years' user, a grant being presumed: *Baxendale* v. *McMurray* (1) as to right to pollute water; *Crump* v. *Lambert* (2) as to noise and smell; *Gale* on Easements (3); *Ball* v. *Ray* (4).

The effect of the decision under appeal, if upheld, might be most disastrous in *London*. Suppose a printing-press established for more than twenty years, the neighbours not complaining. Another person purchases one of the adjoining properties and applies it to a new purpose, such that the noise and vibration of the presses are found a nuisance; according to this decision he can stop them.

[THESIGER, L.J.:—How can an adjoining owner stop the noise here complained of, as he had no house on the ground and suffered no inconvenience?]

We apprehend that a person might set up a tent close to the wall, and bring an action on the ground that he could not sleep in it for the noise. In *Elliotson* v. *Feetham* (5) and *Bliss* v. *Hall* (6) it was intimated that twenty years would give a right. In *Flight* v. *Thomas* (7) the case was disposed of on a point of pleading, but it was intimated that twenty years' user would confer a right of sending out bad smells. *Wright* v. *Williams* (8) is also a case in our favour. In *Gaunt* v. *Fynney* (9) the Lord Chancellor treats noise as standing on the same footing with other nuisances, and as legalised by twenty years; and *St. Helen's Smelting Company* v. *Tipping* (10) assumes the law to be so. The cases are discussed in *Angus* v. *Dalton* (11). Twenty years' user gives a right of support to a house: *Partridge* v. *Scott* (12); though there is no right of action in the meantime. If a grant is presumed after

(1) Law Rep. 2 Ch. 790.
(2) Ibid. 3 Eq. 409, 414.
(3) 4th Ed. p. 20.
(4) Law Rep. 8 Ch. 467, 471.
(5) 2 Bing. N. C. 134.
(6) 4 Bing. N. C. 183.
(7) 11 A. & E. 688.
(8) 1 M. & W. 77.
(9) Law Rep. 8 Ch. 8, 11.
(10) 11 H. L. C. 642.
(11) 3 Q. B. D. 85; 4 Q. B. D. 162.
(12) 3 M. & W. 220.

twenty years, how can that presumption be rebutted in the twenty-first by an alteration in the servient tenement? The Master of the Rolls relied on *Webb* v. *Bird* (1); but that was an exceptional case, where an attempt was made to claim an easement of access of wind, a kind of right which had never been heard of before. This is a case in which a grant may fairly be presumed. It is not a question whether such a grant is probable, but whether it is possible: *St. Mary Magdalen College* v. *Attorney-General* (2); *Moore* v. *Rawson* (3). It is not correct to say that the Plaintiff might not have interfered before. There was always some noise and vibration which might, if a right were established, become a nuisance, and that was an injury to the property which might have been stopped by an action: *Kidgill* v. *Moor* (4); *Metropolitan Association* v. *Petch* (5); *Chalmer* v. *Bradley* (6).

Waller, Q.C., and *S. Dickinson*, for the Plaintiff:—

The Defendant cannot have acquired a right to an easement over the Plaintiff's land by prescription; for no grant can be presumed where the owner of the servient tenement had no power to prevent the easement either by physical interference or by an action. In order to acquire a right by prescription the exercise of the right must not be secret, but palpable and adverse to the owner of the servient tenement. In the present case the Plaintiff could not have entered the Defendant's house to stop the noise and vibration, nor could he have brought an action, because there was nothing that amounted to a nuisance till the consulting-room was built: *Webb* v. *Bird* (7); *Chasemore* v. *Richards* (8); *Crump* v. *Lambert* (9); *Gaunt* v. *Fynney* (10); *Ball* v. *Ray* (11); *Elliotson* v. *Feetham* (12); *Flight* v. *Thomas* (13); *Angus* v. *Dalton* (14); *Bright* v. *Walker* (15); *Wilson* v. *Stanley* (16). If the Defendant's

(1) 10 C. B. (N.S.) 268.
(2) 3 Jur. (N.S.) 675.
(3) 3 B. & C. 332.
(4) 9 C. B. 364.
(5) 5 C. B. (N.S.) 504.
(6) 1 Jac. & W. 51.
(7) 10 C. B. (N.S.) 282; S. C. 13 C. B. (N.S.) 282.
(8) 7 H. L. C. 349.
(9) Law Rep. 3 Eq. 409.
(10) Ibid. 8 Ch. 8.
(11) Ibid. 467.
(12) 2 Bing. N. C. 134.
(13) 11 A. & E. 688.
(14) 3 Q. B. D. 85; 4 Q. B. D. 162.
(15) 4 Tyrw. 502.
(16) 12 Ir. C. L. Rep. 345.

C. A. 1879 STURGES v. BRIDGMAN.

contention is correct, a person who is subject to acts by his neighbour which he fears may grow into a nuisance is in a serious difficulty. If he bring an action at once, he is told there is no nuisance; if he waits till the acts amount to a nuisance, he is told that a title by prescription has been acquired. It is true that the Plaintiff experienced no nuisance till he built his consulting-room; but every man has a right to the free use of his property for whatever purpose he pleases, provided he does not annoy his neighbours, and he is entitled to be protected in such use.

Method, in reply.

1879. July 1. THESIGER, L.J., delivered the judgment of the Court (*James*, *Baggallay*, and *Thesiger*, L.JJ.) as follows:—

Bapp Cas 774.

The Defendant in this case is the occupier, for the purpose of his business as a confectioner, of a house in *Wigmore Street*. In the rear of the house is a kitchen, and in that kitchen there are now, and have been for over twenty years, two large mortars in which the meat and other materials of the confectionery are pounded. The Plaintiff, who is a physician, is the occupier of a house in *Wimpole Street*, which until recently had a garden at the rear, the wall of which garden was a party-wall between the Plaintiff's and the Defendant's premises, and formed the back wall of the Defendant's kitchen. The Plaintiff has, however, recently built upon the site of the garden a consulting-room, one of the side walls of which is the wall just described. It has been proved that in the case of the mortars, before and at the time of action brought, a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room, and which, unless the Defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The Defendant contends that he had acquired the right, either at Common Law or under the *Prescription Act*, by uninterrupted user for more than twenty years.

In deciding this question one more fact is necessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the Plaintiff or to any previous occupier of the Plaintiff's house by what the Defendant did. It is

true that the Defendant in the 7th paragraph of his affidavit speaks of an invalid lady who occupied the house upon one occasion, about thirty years before, requested him if possible to discontinue the use of the mortars before eight o'clock in the morning; and it is true also that there is some evidence of the garden wall having been subjected to vibration, but this vibration, even if it existed at all, was so slight, and the complaint, if it could be called a complaint, of the invalid lady, and can be looked upon as evidence, was of so trifling a character, that, upon the maxim *de minimis non curat lex*, we arrive at the conclusion that the Defendant's acts would not have given rise to any proceedings either at law or in equity. Here then arises the objection to the acquisition by the Defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventible nor actionable found an easement? We think not. The question, so far as regards this particular easement claimed, is the same question whether the Defendant endeavours to assert his right by Common Law or under the *Prescription Act*. That Act fixes periods for the acquisition of easements, but, except in regard to the particular easement of light, or in regard to certain matters which are immaterial to the present inquiry, it does not alter the character of easements, or of the user or enjoyment by which they are acquired. This being so, the laws governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario;* for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acqui-

C. A. 1879 STURGES v. BRIDGMAN.

escence. Upon this principle it was decided in *Webb* v. *Bird* (1) that currents of air blowing from a particular quarter of the compass, and in *Chasemore* v. *Richards* (2) that subterranean water percolating through the strata in no known channels, could not be acquired as an easement by user; and in *Angus* v. *Dalton* (3) a case of lateral support of buildings by adjacent soil, which came on appeal to this Court, the principle was in no way impugned, although it was held by the majority of the Court not to be applicable so as to prevent the acquisition of that particular easement. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply your consent to your neighbour enjoying something which passes from your tenement to his, as to his subjecting your tenement to something which comes from his, when in both cases you have no power of prevention. But the affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement, but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete cases—the passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action. *Webb* v. *Bird* and *Chasemore* v. *Richards* are not, therefore, direct authorities governing the present case. They are, however, illustrations of the principle which ought to govern it; for until the noise, to take this case, became an actionable nuisance, which it did not at any time before the consulting-room was built, the basis of the presumption of the

(1) 13 C. B. (N.S.) 841. (2) 7 H. L. C. 349. (3) 4 Q. B. D. 162.

consent, viz., the power of prevention physically or by action, was never present.

It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go—say into the midst of the tanneries of *Bermondsey*, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey;* and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equally degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship

C. A. 1879 STURGES v. BRIDGMAN.

may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the Court below took substantially the same view of the matter as ourselves and granted the relief which the Plaintiff prayed for, and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs.

Solicitors: *Garrard, James, & Wolfe; Clarkson, Son, & Greenwell.*

C. A. 1879 *June* 30; *July* 1.

RENALS *v.* COWLISHAW.

[1876 R. 89.]

Restrictive Covenant—Covenantee, Assign of—Right to sue.

13 Ch D 326.3
19 Ch D 263
23 Ch D 87

The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the Defendant's predecessors in title, who entered into covenants with the vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the Plaintiff's predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them:—

Held (affirming the decision of *Hall*, V.C.), that the Plaintiffs were not entitled to restrain the Defendants from building in contravention of the restrictive covenants entered into by their predecessors in title.

THIS was an appeal by the Plaintiffs from a decision of Vice-Chancellor *Hall* (1).

Hastings, Q.C., and *Renshaw*, for the Appellants:—

We contend that a covenant must be treated in equity as running with the land to assigns of the covenantees if three requisites are satisfied—1, that the covenant must extend to assigns; 2, that the person claiming the benefit of the covenant must be assign of the same estate as the covenantee; and, 3, that there is not anything in the nature of the transaction to shew that

(1) 9 Ch. D. 125.

it was not the intention of the parties that the covenant should run with the land.

[JAMES, L.J.:—With what land do you say that the covenant runs? If the vendors had also had property in *Yorkshire*, a purchaser of that would have been an assign. Could he enforce the covenant?]

We say it runs with the *Mill Hill* estate, which is mentioned in the covenant as belonging to the trustees. The covenant cannot have been intended for their personal benefit, but must have been intended to enure for the benefit of the neighbouring unsold lands. We are equitable assignees of the covenant: *Western* v. *Macdermott* (1).

[JAMES, L.J.:—There a particular field was clearly referred to, and it was a case of reciprocal rights.

BAGGALLAY, L.J.:—Both parties derived title under a deed embodying a general building scheme.]

The Master of the Rolls puts it on this, that the covenant was a covenant entered into for the benefit of the unsold property, and that the Plaintiff, as assign of part of that property, was entitled to the benefit of the covenant. The Vice-Chancellor holds that it is not enough for the subsequent purchaser to be an assign of the land, but that he must shew an intention to give him the benefit of the restrictive covenants. This is a novel doctrine, and inconsistent with what was said by Lord *Hatherley* in *Child* v. *Douglas* (2).

[BAGGALLAY, L.J.:—Was not the land there laid out according to a building scheme?]

Yes; but we say it is not necessary that there should be any express notice or mention of the restrictive covenant. The purchaser takes the land with the advantages appurtenant to it.

[JAMES, L.J.:—Is there any case to shew that if the owner of 100 acres sells an acre, taking a restrictive covenant, and sells the remainder in lots of an acre each, every one of the ninty-nine purchasers can enforce the covenant against the purchaser of the first acre?]

(1) Law Rep. 1 Eq. 499; Ibid. 2 Ch. 72. (2) 2 Jur. (N.S.) 950.

35 Beav. 243.

C. A. 1879 RENALS v. COWLISHAW.

The case does not seem to have occurred at law, but in equity there are *Mann* v. *Stephens* (1) and *Eastwood* v. *Lever* (2), where the law is laid down in our favour, though the Plaintiff there was held to have lost his right by acquiescence.

[JAMES, L.J.:—There was a building scheme, and the covenants were entered into for maintaining the general character of the neighbourhood. If the general character of the neighbourhood changes the obligation ceases: *Duke of Bedford* v. *Trustees of British Museum* (3).]

Child v. *Douglas* (4) is an authority that express words are not wanted. Here we have all the elements of that case. In *Eastwood* v. *Lever* no doubt stress is laid on the particular ground mentioned in the judgment, but there is nothing laying down that in the absence of that ground the Plaintiff could not have sued. The Vice-Chancellor thought that this case was governed by *Keates* v. *Lyon* (5), but there the covenant did not mention assigns.

[JAMES, L.J.:—That is immaterial in equity, though it is important on the question whether a covenant runs with the land at law.]

In *Master* v. *Hansard* (6) the Plaintiff was not assign of the same estate as the covenantee; he was only another lessee under the covenantee.

W. Pearson, Q.C., and *Bury*, for the Respondents, were not called upon.

JAMES, L.J.:—

I am of opinion that the decision of Vice-Chancellor *Hall* is correct. It is impossible, as it seems to me, to distinguish this case from the cases to which he has referred. To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into. Supposing I were now framing

(1) 15 Sim. 377.
(2) 4 D. J. & S. 114.
(3) 2 My. & K. 552.
(4) 2 Jur. (N.S.) 950.
(5) Law Rep. 4 Ch. 218.
(6) 4 Ch. D. 718.

C. A. 1879 RENALS v. COWLISHAW.

the deed afresh, I should not have the remotest idea how the covenant ought to be framed, as I cannot tell what the property was which the parties intended to be protected, and within what limits.

I do not think it necessary to add anything more, except that I entirely concur with every word of the judgment of Vice-Chancellor *Hall*.

BAGGALLAY, L.J.:—

I am of the same opinion with the Lord Justice, and I adopt entirely the language of the Vice-Chancellor in his judgment, as reported (1).

THESIGER, L.J.:—

I am of the same opinion.

Solicitors: *Satchell & Chapple; R. Wastell.*

Ex parte KIMBER. *In re* THRIFT.

C. A. 1879 C. J. B. *March* 24. C. A. *July* 3.

Practice—Vacating Appointment of Trustee—Proof improperly rejected.

It is the settled practice of the Court of Bankruptcy not to vacate the appointment of a trustee merely because a proof has been improperly rejected.

In order to induce the Court to vacate the appointment, special circumstances—such as that the rejection of the proof has been procured by fraud—must be shewn. At any rate an application for such an order must be made very promptly after the rejection of the proof.

Ex parte Crowther (2) not followed.

AN adjudication of bankruptcy having been made against *Valentine Thrift* in the *Greenwich* County Court, the first meeting of the creditors was held on the 28th of January, 1879. At the meeting a proof for £167 8*s.* 4*d.* was tendered by the petitioning creditor, and a proof for £208 4*s.* 7*d.*, was tendered on behalf of Mr. *Edward Kimber*, who had been the bankrupt's solicitor. No other creditors attended. The latter proof was made by

(1) 9 Ch. D. 125. (2) 24 L. T. (N.S.) 330.

C. A. 1879 *Ex parte* KIMBER. *In re* THRIFT.

Frederick Snelling, Kimber's managing clerk, who deposed that the £208 4*s.* 7*d.* was due to *Kimber* for professional services rendered by him to the bankrupt. *Snelling* attended the meeting as proxy for *Kimber*. The proof was objected to by the solicitor of the petitioning creditor, on the ground that no bill of costs had been delivered by *Kimber* to the bankrupt. The Registrar thereupon decided that *Kimber* could not vote on the choice of a trustee; and said that he intended to allow the petitioning creditor to appoint a trustee. *Snelling* claimed to withdraw the proof, and insisted that the meeting must be adjourned, as there would not then be a quorum of creditors present.

The Registrar decided that the proof could not be withdrawn, but that *Kimber* must be counted as one of the creditors present, though he could not be allowed to vote. The trustee named by the petitioning creditor was accordingly appointed. On the 19th of February *Kimber* applied to the Judge of the County Court that the appointment of the trustee might be vacated, and a day appointed for a new first meeting for the choice of a fresh trustee, and that in the meantime all further proceedings in the bankruptcy might be stayed.

The Judge refused the application, on the ground that a bill of costs ought to have been delivered, and that *Snelling* ought to have stated in the proof what would be allowed on taxation.

Kimber appealed to the Chief Judge.

The appeal was heard on the 24th of March, 1879.

Doria, for the Appellant:—

Though a creditor comes to prove on an open account, which may be reduced on investigation, still he is nevertheless entitled to vote; otherwise the trustee may be chosen by the creditors who are in the minority in value: *Ex parte Simpson* (1). A solicitor's bill until taxed is an open account. The Court will vacate the appointment and order a new choice of trustee when the proof is admitted: *Ex parte Crowther* (2). According to Lord Justice *Mellish*, in *Ex parte Peacock* (3), a claim for costs is a debt provable under sect. 31, although they may not have been taxed at the date of the adjudication.

(1) 1 Atk. 70. (2) 24 L. T. (N.S.) 330. (3) Law Rep. 8 Ch. 682.

Hughes (solicitor), for the Respondent, was not called on.

BACON, C.J.:—

The law in such cases as this is now well settled. If the Appellant had made an affidavit in which he had sworn that, though his costs had not been taxed, at least a certain sum, naming it, was due to him for those costs, he might have proved. It was, however, impossible to admit his proof as he presented it, and the County Court Judge very properly rejected it. As the Appellant has not chosen to frame his proof as he might have done, he cannot complain. The proper course for a creditor under such circumstances to pursue is laid down in *Ex parte Ruffle* (1), and that case clearly shews that no difficulty need arise from the bill of costs not being taxed, because the debt might have been sworn at a certain amount. The appeal must be dismissed with costs.

From this decision *Kimber* appealed.

By his notice of appeal he asked that the order of the Chief Judge might be reversed or varied, or that his proof might be admitted, subject, if necessary, to taxation.

The appeal was heard on the 3rd of July, 1879.

The Appellant in person:—

The objection to my proof was that my clerk, who made the affidavit in support of it, ought to have sworn what amount would be found due on taxation. But in the recent case of *Twycross* v. *Grant* (2) the Court of Appeal said that a creditor in respect of untaxed costs could make an affidavit that at least a specified sum was due to him, and could prove for that sum and vote in respect of it. And the amount of a solicitor's bill of costs is a good petitioning creditor's debt, even before taxation and before it has been signed and delivered: *Griffiths* and *Holmes* on Bankruptcy (3); *Ex parte Sutton* (4); *Pulling's* Law of Attorneys (5); *Ex parte Ruffle*; *Ex parte Peacock* (6). It does not follow that a bill of costs will be taxed when it is delivered. The practice of the Court of Bankruptcy is to admit such a proof, subject to taxation.

(1) Law Rep. 8 Ch. 997.
(2) 23 Sol. J. 298.
(3) Vol. i. p. 178.
(4) 11 Ves. 163.
(5) 3rd Ed. p. 337.
(6) Law Rep. 8 Ch. 682.

C. A.

1879

Ex parte KIMBER. *In re* THRIFT.

Finlay Knight, for the trustee:—

The practice was long since settled that the Court would not disturb the choice of assignees merely because a proof had been improperly rejected, which, if admitted, would have turned the scale of the voting; unless the rejection was fraudulent: *Ex parte Durent* (1); *Ex parte Milner* (2). The application originally made by the Appellant was, not to admit the proof, but only to vacate the appointment of the trustee.

The Appellant in reply:—

Ex parte Crowther (3) is a decision of the Chief Judge that, under the *Bankruptcy Act*, 1869, the appointment of trustee will be vacated if the proof of a creditor is rejected, and he is thus prevented from voting, and his proof is afterwards admitted.

Finlay Knight:—In that case there had been a previous successful appeal from the rejection of the proof.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge ought to be affirmed. The application to him was simply to vacate the appointment of trustee. It was laid down in the cases which have been referred to, that the choice of assignees ought not to be disturbed merely because a proof has been improperly rejected, and the Judges who decided these cases referred to that rule as being the established practice of the Court. Probably no Judge had greater experience in the practice of the Court of Bankruptcy than Sir *George Rose*, who decided *Ex parte Milner*. This rule had become the established practice of the Court, and one can easily see the reason for it. If the appointment of trustee is disturbed, all that he has done in the administration of the estate would be disturbed. Unless, therefore, there are some very special circumstances, such as fraud in the procuring the rejection of the proof, the Court will adhere to the settled practice. Though a creditor has a right to vote in the appointment of a trustee, yet that is only part of the machinery for winding up the estate. The

(1) Buck, 201. (2) 3 Dea. & Ch. 235.
(3) 24 L. T. (N.S.) 330.

C. A. 1879 *Ex parte* KIMBER. *In re* THRIFT.

Appellant will not be in the slightest degree prejudiced with regard to his proof or dividend. He is wrong in what he has asked. If he had made his application immediately after the rejection of his proof, if there had been no delay on his part, possibly the Court might have taken a different view of the case. But we must adhere to the settled practice.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitor for trustee: *E. Hughes, Woolwich.*

RALPH *v.* CARRICK.

C. A. 1879 *April* 25, 26.

[1870 R. 157.]

Will—Bequest after Death of Wife—Life Estate by Implication—Descendants taking Parent's Share.

A testator, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay his testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of all his remaining property should be divided into twelve portions, three of which should be given "to the children" of his late aunt, Mrs. *W.*, "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive," with similar gifts to the "children and descendants" of his other aunts; "and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease, nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of an annuity of £700 to which his wife was entitled under her marriage settlement. The wife died in 1876. The testator's co-heirs were certain of the children of the aunts, and his next of kin were certain children of the aunts. The children of the aunts were all dead, but many of them had left children and grandchildren:—

Held (affirming the decision of *Hall*, V.C.), that the widow did not take a life estate by implication.

A life estate in *A. B.* will not be implied from a gift on the death of *A. B.* to the testator's heir-at-law or next of kin along with other persons.

Held (reversing the decision of *Hall*, V.C.), that the substitutionary gift

C. A. 1879 RALPH v. CARRICK.

to "descendants" of children of an aunt was not confined to children of those children.

The word "descendants" is less flexible than "issue," and requires a stronger context to confine it to children.

Held, that if the word used in the present case had been "issue" instead of "descendants," the gift over would have prevented the Court from confining the word to children.

Ross v. *Ross* (1) approved.

Notice by a Respondent under Rules of Court, 1875, Order LVIII., rule 6, to vary the decision of the Court was proceeded upon, though the point was one in which the original Appellant had no interest.

THIS case came before the Court on an appeal by the personal representative of the widow of the testator in the cause from a decision of Vice-Chancellor *Hall* holding that she did not take a life estate in the testator's property. The case is reported (2).

W. Pearson, Q.C., and *Byrne*, for the Appellant:—

If a person gives real estate after the death of *A.* to a person who happens to be his own heir-at-law, *A.* takes a life estate. So if he gives personalty after the death of *A.* to his sole next of kin. When the ulterior gift is to other persons along with the heir or next of kin the case is more doubtful. The issue, it must be observed, take only by way of substitution, the children being the primary objects of gift, and we contend that if after the death of *A.* there is a gift to *B.*, who is the heir-at-law, with a substitutionary gift in the event of *B.'s* death, the construction is the same as if there was no such gift over. Unless some rule of law interferes, a will ought to be construed as an ordinary intelligent person would construe it; and a gift to the heir-at-law along with somebody else at a future time shews that the heir is not to take at once. Now as to the cases where the heir-at-law or next of kin are some only of the class of ulterior takers, *Hutton* v. *Simpson* (3) is in our favour, but as the inaccuracy of that report is shewn in *Rex* v. *Inhabitants of Ringstead* (4) we cannot rely on it. The cases of *Blackwell* v. *Bull* (5), *Bird* v. *Hunsdon* (6), and *Cockshott* v. *Cockshott* (7) support our contention.

(1) 20 Beav. 645.
(2) 5 Ch. D. 984.
(3) 2 Vern. 722.
(4) 9 B. & C. 218.
(5) 1 Keen, 176.
(6) 2 Sw. 342.
(7) 2 Coll. 432.

[COTTON, L.J. :—I do not find that in any of the cases the rule is laid down that a gift to the heir-at-law along with others, after the death of *A. B.*, raises the implication of a life estate in *A. B.* They seem to go on the ground that, taking the whole will together, an intention to give a life estate was to be discovered.]

In *Blackwell* v. *Bull* (1) there was nothing else from which to raise the implication. *Humphreys* v. *Humphreys* (2) is in our favour, as also *Roe* v. *Summerset* (3) there referred to. In *Jarman* on Wills (4) it is laid down that on a devise to one of several co-heirs after the death of another the implication does arise, but that on a devise to an heir along with others it does not. Yet the only case he refers to on the latter point is *Blackwell* v. *Bull*, which decides the contrary. *Aspinall* v. *Petvin* (5) is relied on against us, but that case went on the ground that the future devise was to a stranger. *In re Smith's Trusts* (6) shews what circumstances the Court will take into consideration. *Cock* v. *Cock* (7) is an instance of implication from a gift to several of the next of kin after the death of the other of them. The Vice-Chancellor has not attributed sufficient importance to the fact that the gift to the issue is merely substitutionary.

Mackeson, Q.C., and *W. W. Karslake*, *Dickinson*, Q.C., and *H. A. Giffard*, *Horne*, *Bristowe*, Q.C., and *G. I. F. Cooke*, for the Respondents, were not called on.

JAMES, L.J. :—

I am of opinion that it is impossible for us to differ from the Vice-Chancellor's conclusion as to the meaning of this will. Possibly we may say, as was said by Lord *Alvanley* in *Upton* v. *Lord Ferrers* (8), that a private man would undoubtedly say that the testator must have intended his wife to take for her life. Courts of law, however, as his Lordship went on to observe, have always said that they cannot in such a case as this draw that inference.

(1) 1 Keen, 176.
(2) Law Rep. 4 Eq. 475.
(3) 5 Burr. 2608.
(4) 3rd Ed. vol. i. p. 497.
(5) 1 S. & S. 544.
(6) Law Rep. 1 Eq. 79.
(7) 21 W. R. 807.
(8) 5 Ves. 800.

C. A. 1879 RALPH v. CARRICK. James, L.J.

Where there is a gift to the heir-at-law after the death of *A. B.* that gift is useless except for the purpose of expressing that the heir-at-law is not to take till after the death of *A. B.*, and the inference has been drawn from that that *A. B.*, after and not until whose death he is to get it, takes it in the meantime. The same principle has been applied to the case of next of kin. Where the gift is not a gift *simpliciter* to the person who was heir-at-law or next of kin at the date of the will, all the cases except the case before Vice-Chancellor *Stuart*, which is inconsistent with the current of authority, treat a future gift to persons of whom the heir-at-law is one as insufficient to raise the implication. Here the ultimate gift is to a class of persons to be ascertained at the death of the wife. It is not a gift to a person who is heir-at-law or next of kin, but must be dealt with as a gift to persons who do not stand in either of those positions, and in that case there is no implication in favour of the wife. If we held that there was, we should be deciding that *A. B.* is to have a life estate merely because the gift of the property is postponed till after *A. B.'s* death, which is in contravention of the rule laid down by the authorities. There is nothing in this case except that the gift is not to take place till after the death of *A. B.*, with a direction that the estate shall not be sold for two years, which does not seem to make any difference. It is a mere case of a gift to a class of persons after the death of another person, those persons not being necessarily heirs-at-law or next of kin of the testator. I do not think it necessary to go through the cases which the Vice-Chancellor has gone through, and I need only say that I agree with him, except that I think the cases are rather stronger than he has represented them.

BRETT, L.J. :—

It sometimes amuses me when we are asked to say what was the actual intention of a foolish, thoughtless, and inaccurate testator. That is not what the Court has to determine: all the Court can do is to construe, according to settled rules, the terms of a will, just as it construes the terms of any other written document. This is obviously the will of a foolish, thoughtless, and inaccurate man. If he really intended his wife to have an estate for her life, what

was more easy than for him to say so? If he had any such intention in his mind at the time, he must have deliberately refrained from expressing it.

The real question then is, what, according to recognised rules, is the construction of this will? The first argument was, that in order to give an estate for life by implication, it suffices that some one of the persons to whom the property is given after the decease of the person named in the will should be the heir-at-law or next of kin. If that rule were really established as a rule of construction it would be applicable to this will, and we ought to decide according to it; but to my mind, not only is it not made out that that is such a rule, but the contrary is made out. It seems to me that in *Aspinall* v. *Petvin* (1) and in *Stevens.* v. *Hale* (2) the law is laid down directly to the contrary of the rule contended for. It is true that the rule laid down by Vice-Chancellor *Stuart* in *Humphreys* v. *Humphreys* (3) would support the Appellant's case, and if the authorities had not decided the contrary I should have been happy to hold with him what he was inclined to hold in that case, but I think that the authorities are conclusive against that view. It might have been said that the case of *Hutton* v. *Simpson* (4) was an authority in favour of that proposition, but when that case was examined by Mr. Justice *Bayley* in the case of *Rex* v. *Inhabitants of Ringstead* (5), it was found not to be so. The proposition contended for by the Appellant is not made out by any case. It has in its support the *dictum* in *Humphreys* v. *Humphreys,* but I am sorry to say I think that *dictum* cannot be supported. Unless, therefore, there are some particular expressions in the will to take it out of the general rule, we must decide against the Appellant. I do not see anything in the context of this will to assist his contention, and therefore I am of opinion that the decision of Vice-Chancellor *Hall* was correct.

COTTON, L.J.:—

I am of opinion that upon the point now argued the decision of the Vice-Chancellor was correct; and in consequence of the course

(1) 1 S. & S. 544.
(2) 2 Dr. & Sm. 22.
(3) Law Rep. 4 Eq. 475.
(4) 2 Vern. 722.
(5) 9 B. & C. 218.

C. A. 1879 RALPH v. CARRICK. Cotton, L.J.

the argument has taken, I think it right to say something as to the general rules that should govern us in deciding on the construction of wills, and as regards the rule applicable to gifts which it is attempted to raise by implication.

As regards our duty when wills come before us for construction, it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. Even very intelligent persons whose minds are not so trained are accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's ind, as regards the attention to be paid to the claims of the different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shewn, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it.

Let us see, before we come to this will, whether or no there is any general rule that will help us in interpreting it. As regards the raising gifts for life by implication arising from a gift to some person after the death of the person to whom it is sought to give a life estate by implication, we have two rules. As to real estate, if there is a gift to a testator's heir-at-law after the death of *A.*, that does give by implication a life estate to *A.* If there is a gift of the testator's real estate to a stranger after the death of *A.*, that does not raise the implication.

Then, for the purpose of seeing whether the principle of one of

those rules or of the other applies to the present case, we must consider what is the principle of the two rules. As regards an heir-at-law, if the real estate is given to him alone after the death of *A. B.*, there is a gift to him at that time of what, in the absence of any gift, he would take immediately after the death of the testator. To make sense of this you must take it as expressing an intention to exclude the heir-at-law till that time arrives. Now an heir-at-law can only be excluded by giving the property to somebody else, and therefore, when there is a gift to the heir-at-law alone of real estate after the death of *A.*, a gift of a life estate to *A.* is implied, because in no other way can the heir-at-law be excluded. But if the gift of the estate after the death of *A.* is to a stranger, that reasoning does not apply, for the stranger takes simply and entirely by the bounty of the testator, and in the absence of any gift, neither after the death of the named person nor at any other time, will he take anything, and it is not necessary to give anything to *A.* in order to postpone the gift to the stranger, for there is no difficulty in giving an estate to the stranger on the death of *A.*, leaving it in the meantime to go to the heir-at-law.

Is there any rule established by the authorities as applicable to a gift to the heir-at-law and another person jointly after the death of *A.* I am of opinion that none of the cases establish any rule of construction applicable to such a case. Although cases have been cited in which, in a gift to an heir-at-law and others after the death of *A.*, a life estate to *A.* has been implied, none of the Judges have laid down that there is a general rule of construction which, unaided by anything else in the will, will raise the implication from a devise in those terms. In each case the decision has been rested on the particular expressions of the will, and this negatives the existence of any such general rule of construction as has been contended for. I must of course except the case before Vice-Chancellor *Stuart*, in which he does lay down a general rule applicable to these cases, but in my opinion he went beyond the authorities on which he purported to rely, and laid down a rule which cannot be supported.

That being so, does this case come within the principle of the rule applicable to a gift to the heir-at-law after the death of *A.*, or within the principle of the rule applicable to a gift to a

C. A. 1879 RALPH v. CARRICK. Cotton, L.J.

stranger after the death of *A.*? In my opinion it comes within the latter, because, although the heir-at-law is one of the persons to whom the gift is made, it is not necessary to give to anybody else in order to postpone the interest he is to take under the will, as he does not under the gift take that which, independently of gift, would come to him. Independently of gift he takes the whole real estate, but under that gift he takes only a share in it. So that, both as regards the interest given to the stranger and as regards the modification of the interest which the heir-at-law takes, it cannot be said that the gift after the death of *A.* is inoperative, unless you treat it as a postponement of the gift and give a life interest to *A.*

There being, then, no such canon or rule of construction as the Appellant contends for, he must fail unless there be on the face of the will an expressed intention by the testator that the widow shall have a life estate. I can see nothing in this will that can be held to shew such an intention, and I should say that there was rather an indication of an intention to the contrary, because the testator refers to the fact that the widow was to have £700 a year, and directs it to be paid out of the income of his estate, and if he intended to give her a life estate it is extraordinary that he should not go on to direct the surplus to be paid to her. Possibly the necessity of providing for his wife's annuity may have been the ground for postponing the division of his estate. That is conjecture, but to give a life interest to his widow would be only a conjecture, and we are not entitled to conjecture what the testator meant to do. We can only look to what on the face of the will he has said is to be done. The order of the Vice-Chancellor on this point must, therefore, be affirmed.

Eddis, Q.C., and *Ford*, for the Plaintiff, who had given notice under Order LVIII., rule 6, that he should contend that the decision ought to be varied:—

We contend that the Vice-Chancellor was wrong in applying the doctrine of *Sibley* v. *Perry* (1) to this case.

[JAMES, L.J.:—Is this case within Order LVIII., rule 6, the point being one in which the Appellant is in no way interested?]

(1) 7 Ves. 522.

They referred to *Hunter* v. *Hunter* (before the Court of Appeal, April 7th, 1876), and the case was allowed to proceed.

The question is, whether this case ought to be determined according to *Sibley* v. *Perry* (1) or *Ross* v. *Ross* (2). The gift being *per stirpes*, the children and parents cannot take concurrently: *Gibson* v. *Fisher* (3). The distinction between *Sibley* v. *Perry* and *Ross* v. *Ross* is in the gift over. The Master of the Rolls observes in the latter case that if the doctrine of *Sibley* v. *Perry* is applied, the gift over is interfered with, and an intestacy may result. Every descendant, however remote, must have a parent; so a direction that issue shall only take their parent's share is perfectly sensible, without confining issue to children of the person first mentioned. In *Pruen* v. *Osborne* (4) it is said that the rule in *Sibley* v. *Perry* is to be applied if there is nothing else in the will. Here there is a something else, a gift over couched in unambiguous terms, such that if the children had died, yet if there were grandchildren living, the gift over could not take effect; so if there is no gift to the grandchildren there must be intestacy. In the gift over the word "descendants" cannot possibly be used as a synonym for "children," so it ought not to be taken to be so used in the previous gift. The word "descendants" is not so readily cut down to mean "children" as the word "issue," which in popular language is only applied to children. *Ross* v. *Ross* was followed by the Master of the Rolls in *Robinson* v. *Sykes* (5) and *Smith* v. *Horsfall* (6), and is treated by the text writers as establishing a modification of *Sibley* v. *Perry*: *Jarman* on Wills (7); *Hawkins* on Wills (8).

Bristowe, Q.C., and *G. I. Foster Cooke*, *contrà*:—

Sibley v. *Perry* has always been treated as laying down the general rule that where issue are directed to take their parent's share, "issue" means children. This was recognised in *Pruen* v. *Osborne* and *Heasman* v. *Pearse* (9), and was admitted in *Ross*

(1) 7 Ves. 522.
(2) 20 Beav. 645.
(3) Law Rep. 5 Eq. 51.
(4) 11 Sim. 132.
(5) 23 Beav. 40.
(6) 25 Beav. 628.
(7) 3rd Ed. vol. ii. p. 92.
(8) 1st Ed. p. 89.
(9) Law Rep. 7 Ch. 275.

C. A. 1879

RALPH v. CARRICK.

v. *Ross* (1). The same rule is affirmed in *Martin* v. *Holgate* (2) and *Bryden* v. *Willett* (3).

[COTTON, L.J.:—In *Sibley* v. *Perry* (4) Lord *Eldon* considered that the testator explained "issue" to mean children. Here, in the gift over, the testator does not use "descendants" in the sense of children.

JAMES, L.J.:—"Issue" popularly means children, and can hardly be treated as synonymous with descendants.]

Each is *nomen generalissimum*, and it would be difficult to lay down any distinction between them. The gift over must be read with reference to the original gift. In *M'Gregor* v. *M'Gregor* (5) there was a gift over, as in *Ross* v. *Ross*, but it was not held to alter the construction. *Ross* v. *Ross*, as explained by the Vice-Chancellor in this case, turned upon the special wording of the will.

JAMES, L.J.:—

In my opinion we cannot agree with the decision of the Vice-Chancellor. It is, I think, much to be regretted that *Sibley* v. *Perry* was ever made a leading case, because, according to the report of what Lord *Eldon* himself said in that case, it is, to my mind, perfectly clear that he never intended to lay down any general rule or canon of construction, but was dealing only with the peculiar language of the will in that particular case. He found one clause in which he considered that the testator had used the word "issue" to signify children only, and then he said, I give the same meaning to the word "issue" in other parts of the will. It is, however, I think, settled, but rather by the case of *Pruen* v. *Osborne* (6) than by *Sibley* v. *Perry*, that as a general rule when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word issue is cut down to mean children. I am not sure that some of the consequences of such a rule have always received the attention they ought to have received. Suppose a man to leave his property

(1) 20 Beav. 645.
(2) Law Rep. 1 H. L. 175.
(3) Ibid. 7 Eq. 472.
(4) 7 Ves. 522.
(5) 1 D. F. & J. 63.
(6) 11 Sim. 132.

to his wife for life, and at her death to all his children then living and the issue of such of them as should be then dead, equally to be divided between them, the issue of any of them who might be then dead to take only their parent's share. Suppose then his children all to die before the period of division, having had children who predeceased them leaving families. The grandchildren might go to the workhouse, and the family property go to a stranger under the residuary gift. That seems a possible result of that rule.

Now the word "issue" is an ambiguous word. In the ordinary parlance of laymen it means children, and only children. When you talk of what issue a man has, or what issue there has been of a marriage, you mean children not grandchildren or great-grandchildren. But in the language of lawyers, and only in that language, it means descendants; and in the case of *Sibley* v. *Perry* (1) Lord *Eldon* found ground for coming to the conclusion that the word "issue" had, in the will before him, the layman's meaning of children, and not the lawyer's meaning of descendants. But in this case there is what appears to me to be a perfectly unambiguous word—"descendants"—a word which I venture to say no layman or lawyer would use to designate children only. Descendants means children and their children and their children to any degree, and it is difficult to conceive any context by which the word "descendants" could be limited to mean children only. I should therefore say that the case of *Sibley* v. *Perry* has really no application to this will.

But supposing the word "issue," and not the word "descendants," had been used, it seems to me impossible to distinguish the case from *Ross* v. *Ross* (2), or to say that *Ross* v. *Ross* was not decided upon very sound principles. There it was held that the language of the gift over rendered it impossible to give the limited meaning of "children" to the word "issue." It is one of the most settled, and appears to me one of the most reasonable rules of construction, that where there is a gift over on the failure of certain persons the previous gift must, if the words reasonably admit of it, be construed as a gift to the same persons. Here it is beyond all question that the gift over is only to take effect upon

(1) 7 Ves. 522. (2) 20 Beav. 645.

C. A. 1879 RALPH v. CARRICK. James, L.J.

an absolute failure of the descendants of all the aunts. There is nothing whatever to limit the words, and we are bound, unless there is something which absolutely compels us to the contrary, to suppose that the original gift was to the persons on failure of whom the gift over was to take effect. The Courts have constantly applied this principle by way of implication. If before the *Wills Act* an estate was devised to *A.* for life, and if he should die without issue, then over, as the estate was not to go over until the general failure of issue, an estate tail carrying the property to the issue was implied. So also cross remainders are constantly raised by implication in the same way. Here we have a gift over of all the funds provided for the aunts and their descendants, which gift over is not to take effect except on failure of all the descendants of the aunts; and this appears to me to exclude the limited construction which it is sought to give to the original gift. That was decided in *Ross* v. *Ross* (1), and it seems to me rightly decided. I really cannot bring myself to entertain any doubt that when this testator said descendants he meant descendants, and that the effect of the direction as to their taking their parent's shares is, that they take *per stirpes* not *per capita,* so that children do not take concurrently with their parents. This gives full effect to the words, so that there is no incongruity or inconsistency in the will.

BRETT, L.J.:—

I think, after the way in which *Sibley* v. *Perry* (2) has been spoken of in subsequent decisions, we are not at liberty to say that it does not lay down a general rule. But I think the fate of that general rule will be the fate which usually accompanies a rule which is not liked, namely, that it will be applied to cases exactly like *Sibley* v. *Perry,* and to no others; or, in other words, it will be no general rule at all, and, after hearing what the effect of such a general rule may be as described by Lord Justice *James,* I should have no objection to be present at the funeral of *Sibley* v. *Perry.* But assuming *Sibley* v. *Perry* to lay down a general rule, that general rule, as it seems to me, is not applicable to this will. That general rule applies to the collocation in a particular manner of the words "issue" and "parent," but it seems to me that it doe

(1) 20 Beav. 645. (2) 7 Ves. 522.

not apply, neither does the principle of it apply, to any collocation of the words "descendants" and "parent." In ordinary parlance the *primâ facie* meaning of issue is children. In legal documents its *primâ facie* meaning is "descendants," that is to say, the word "issue" may mean children only or it may mean descendants. But the *primâ facie* meaning of "descendants" in ordinary parlance is all descendants, and not only children, and I know of no authority for saying that the word, merely because it is in collocation with the word "parents," is to have any other than its ordinary meaning. I do not think that it can properly be said that because issue may mean either children or descendants, therefore descendants may mean either children or descendants. It would require to be shewn by something much more clear than the mere collocation of the words "parents" and "descendants" that a testator had used the word "descendants" in a way in which no other person would use it so as to bring the case within the rule of *Sibley* v. *Perry* (1). But even if the word "issue" here had been used in the first part of this will, it seems to me nevertheless that the construction of this will would have been in accordance with *Ross* v. *Ross* (2).

Now with regard to the case of *Ross* v. *Ross*, I confess that I do not understand the first part of the judgment of the Master of the Rolls. We gain, however, from that case a very distinct ground of decision arising from the gift over. It is an authority for holding that where the word "issue" is used in its more extended meaning in the gift over, that more extended meaning is to be carried back to the former part of the will, though the word is there in collocation with parents, and that the case is thus taken out of the operation of the rule in *Sibley* v. *Perry*.

COTTON, L.J. :—

I also am of opinion that the decision of the Vice-Chancellor on this point cannot be sustained. It has been very much pressed upon us that there was a general rule laid down by Lord *Eldon* in *Sibley* v. *Perry*, and that to reverse the decision of the Vice-Chancellor would be to depart from the general rule so laid down. Certainly if Lord *Eldon* had laid down any general rule of con-

(1) 7 Ves. 522. (2) 20 Beav. 645.

C. A. 1879 RALPH v. CARRICK. Cotton, L.J.

struction which would apply to the present case I should follow it. But we must remember that general rules of construction are not fetters which prevent the Court from giving due weight to any expressions of the testator which tend to take a case out of those rules. As I understand it, a rule of construction comes to this, that certain expressions are to bear a particular meaning, unless there is something in the will to control them. Thus, for instance, if there is a life estate followed by a gift among a number of persons or the survivors of them, the general rule of construction is that the word "survivors" refers to those who survive the tenant for life, and if there is not a life estate, then, *primâ facie*, as a general rule, it refers to those who survive the testator, but this rule is liable to be controlled in each particular case by the expressions used by the testator. So that, even if there had been a general rule laid down in *Sibley* v. *Perry* (1), we should have to consider how far the words used in this particular will do or do not take the case out of that general rule. It has been argued as if *Sibley* v. *Perry* had laid down this general rule, that wherever you find issue and parent in collocation, issue, although unless restrained the word is most general in its meaning and includes all descendants, will be cut down to mean children of the persons described as parents. Now in the first place *Sibley* v. *Perry*, as far as decision went, laid down no such general rule, for Lord *Eldon* was careful to declare his opinion in these terms: "I shall express the ground of my opinion in the declaration. Declare that upon the true construction of this will and the whole of it taken together, the testator by the words 'lawful issue' in these clauses meant children, and the distribution shall be accordingly." He laid down no general principle except this, that issue included all descendants, but was a word capable of being controlled by the context, and then says that in the particular will it was cut down and confined to children. The point most favourable to the Respondent's contention on this appeal is that which arises on the third clause of the will in *Sibley* v. *Perry*, which no doubt Lord *Eldon* did consider to assist him in arriving at the meaning of the word "issue" in other clauses. That third clause was a clause which gave £1000 to each of three persons named, and

(1) 7 Ves. 522, 533.

then it went on: "And if all or any of them shall die before I do, then I will that the lawful issue of every one of them so dying before me shall share and share alike have and enjoy that £1000 stock which their respective parents if living would have had and enjoyed." Now no person or parent of anybody could enjoy £1000 stock as a whole except the three individuals named, and Lord *Eldon* held that parent in that clause must bear its proper meaning of father or mother as there was nothing to control it. A person to whose issue there was a gift was referred to as the parent of all the issue to whom the gift is made: therefore issue in that clause must mean children. That was all that Lord *Eldon* laid down. He also goes through the rest of the will most carefully to see whether, having regard to all the clauses of the will, he could not see that throughout the will the testator had used the word "issue" as synonymous with child.

Now, how far does that govern the present case? Here we have a gift of certain shares of the estate "to the children of my late aunt Mrs. *Wingate* equally among them, the descendants (if any) of those who may have died being entitled to the benefit which their deceased parent would have received had he or she been then alive." There is nothing there to shew that the person there referred to as parent must of necessity be the child of Mrs. *Wingate,* and if that be so, the foundation of Lord *Eldon's* decision upon the third clause of the will in *Sibley* v. *Perry* (1) has no application. But assume that "descendants" here could be construed to be children of the children of Mrs. *Wingate.* If Lord *Eldon* laid down a general principle, it was this, that he considered the word "issue" in the portion of the will under consideration as children, because it was the meaning which the testator shewed throughout the will he intended to give to that word. Now, can we say that throughout this will descendants is used as children? It cannot be so used, because there are these words, "and should there be no children or lawful descendants of any of my aunts above named remaining at the time these bequests shall become payable," then their shares are to fall into the residue. Here "descendants" are expressly distinguished from "children." In that last gift over I can see nothing to restrict the meaning of

(1) 7 Ves. 522.

C. A. 1879 RALPH v. CARRICK. Cotton, L.J.

the word "descendants," and therefore I consider that throughout the will the testator has not used the word "descendants" as meaning children only. I think that the share given originally to one of the *stirpes* was only to go over if there was an entire failure of that *stirps*. I think it is a sound principle that when there are ambiguous words in the original gift you should not construe the gift over in a restrictive sense which it does not otherwise bear, but should construe the ambiguous words contained in the previous gift so as to agree with the unambiguous words contained in the gift over. If there were any such general rule as the Respondents contend for, this will contains expressions which would control that general rule, and shew that the word "descendants" is used in its ordinary unrestricted sense. It is therefore not necessary in this case to consider how far the word "descendants" is liable to be restricted. But I must say that, as a mere matter of ordinary construction, "descendants" is a more difficult word to control than "issue."

Solicitors: *Patrick; Clarke, Woodcock, and Ryland; Walter, Moojen, & Son; Nelson, Son, & Hastings; Phelps, Sidgwick, and Biddle.*

C. A. 1879 *May* 3.

In re HODGSON (A PERSON OF UNSOUND MIND). LORD KENLIS *v.* HODGSON.

[1870 K. 10.]

One of several Trustees of Unsound Mind—Irish Railway Stock—Transfer into Court.

One of the trustees of an estate which was being administered by the Court having become of unsound mind, an order was made under the *Trustee Act*, 1850, s. 5, appointing a person to concur with the other trustee in transferring into Court certain Irish railway stock standing in the names of the trustees. It being discovered before the order was drawn up that owing to sect. 56 of the Act such an order could not be made as to Irish stock, an order was made appointing a person new trustee of the Irish stock in the place of the person of unsound mind, and directing him to concur with the other trustee in transferring the stock into Court.

HODGSON and *Greene* were the surviving trustees of the will, dated the 2nd of March, 1853, of *William Thompson*, who died in

1854. By the will the trustees were directed to invest the testator's residuary personal estate in land to be settled to the uses declared by his will concerning his real estates.

On the 18th of May, 1877, a decree was made for administration of the real and personal estate of the testator.

The residuary personal estate of the testator consisted of large sums of Consols and Reduced Three per Cents, some *London and St. Katharine Dock* stock, and shares and stock in two Irish railways, standing in the names of *Hodgson* and *Greene*.

Hodgson, who was a person of advanced age, had lately become of unsound mind, but had not been found so by inquisition.

A petition was presented by the Plaintiff in Lunacy, and in the suit and in the matter of the *Trustee Act*, 1850, praying that the right to transfer the above funds, stocks, and shares and to receive the dividends might vest in *Greene*, and that he might be directed to sell part thereof and apply the proceeds in completing certain purchases of land which were mentioned in the petition, and pay the surplus of such proceeds, and transfer the residue of the stocks and shares, into Court to the credit of the suit.

On the 5th of April, on the hearing of the petition, an order was made vesting in *Greene* the right to transfer a specified part of the Government stocks, and directing him to transfer it to himself for the purpose of completing the purchases. As regarded the rest of the Government stock, it was directed that an officer of the bank should be named to concur with *Greene* in transferring such stock into Court, and that a person should be named to concur with *Greene* in transferring the railway and dock stocks into Court.

The Registrar considered that there was no jurisdiction to make this order as to the Irish railway stocks, and declined to draw it up without the direction of the Court.

Macnaghten, for the Petitioner :—

It is apprehended that the Registrar's objection is well founded, for the order is made in Lunacy under sect. 5 of the *Trustee Act* 1850, and the 56th section excludes Irish property from the Lunacy jurisdiction. It is submitted, however, that this difficulty may be got over by appointing, under the *Trustee Extension Act*,

C. A.
1879
In re HODGSON (A PERSON OF UNSOUND MIND.)
LORD KENLIS *v.* HODGSON.

1852, s. 11, a person to be new trustee of the Irish railway stocks and shares along with Mr. *Greene* for the purpose of transferring them into Court, since by sect. 54 of the *Trustee Act*, 1850, Irish property is subject to the Chancery jurisdiction.

[COTTON, L.J. :—I never heard of such a thing as appointing a new trustee under the Act for a limited purpose. I think he must simply be appointed a trustee of this part of the property, with a direction that he and *Greene* shall transfer it into Court.]

Beaumont, for the Respondents :—

We are afraid that if a new trustee is appointed without any limitation, it will be necessary to make him a party to the suit.

[JAMES, L.J. :—When the stocks have been transferred into Court he will be a trustee with no duties to perform, with no trust property vested in him, and subject to no liability. I do not think that he can be a necessary party to the suit.]

THE COURT (*James*, *Brett*, and *Cotton*, L.JJ.) accordingly made an order appointing the person who had been previously named to concur with *Greene* in the transfer, a new trustee of the Irish stock and shares, with a direction to him to concur with *Greene* in transferring them into Court.

Solicitors : *Johnsons, Upton, Budd, & Atkey ; Lake, Beaumont, & Lake.*

GEE *v.* MAHOOD.

C. A.
1879
May 16.

[1871 G. 104.]

Will—Annuity—Corpus or Income—Bequest of Residue—Direction to set apart Investments.

A testator empowered his trustees to make demises of his estate for building purposes, and also at their discretion to sell his real and personal estate, and directed them to invest the proceeds, and the rents, issues, and profits of his estate, and to set apart a sufficient part of such investments to produce an annuity of £1200, which he bequeathed to his wife for her life, payable on the usual quarter days; and he gave the entire residue of his said trust estate, and also that part thereof set apart for his wife after her death, upon certain trusts for the benefit of his children. The income of the estate was not sufficient to provide for the widow's annuity of £1200:—

Held (reversing the decision of *Hall*, V.C.), that the widow was entitled to have the deficiency raised out of the corpus of the trust estate.

Baker v. *Baker* (1) distinguished.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (2).

Robert Gee, by his will made in September, 1868, after appointing his wife and two other persons trustees, and giving his household effects and other things, and a sum of £1200 Consols to his wife, an annuity of £20 to *Mary Drabble*, and all his estate situate at *Norwood* to his wife, gave all other his real estate, and the residue of his personal estate, to the trustees upon trust to receive the rents, issues, and profits thereof upon the trusts thereafter declared. The testator then empowered the trustees to make demises of his estate, or part thereof, for terms of years for building purposes, and also at such times as they should think proper during the widow's life to sell and dispose of his real and personal estate, and directed them to stand possessed of and interested in the money which should arise from the sale or sales of his said estates, and from his personal estates and effects, and the rents, issues, and profits thereof as aforesaid in trust to invest the same in manner therein mentioned. The said will then proceeded as follows: "And upon further trust to set apart a suffi-

(1) 6 H. L. C. 616. (2) 9 Ch. D. 151.

C. A. 1879 GEE v. MAHOOD.

cient portion of such investments as will produce the annuity of £1200 a year which I bequeath to my wife for her life, payable quarterly on every the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, the first quarterly payment to become due on the first of such days as shall happen after my decease, such annuity, in case of my said wife's second marriage, to be reduced to the annual sum of £150, instead of the said sum of £1200, such annuity of £150 to be paid on the same days as the £1200 annuity would otherwise have been payable, the first payment to be made on such of the said days as shall first happen after my said wife's second marriage and the investment so set apart to be reduced accordingly. And subject to such investment in favour of my said wife, in trust to set apart £5000, other part thereof, for my daughter *Zara* on her attainment of the age of twenty-one years or marriage, which shall first happen, to be settled upon her, &c. And as to the entire residue of my said trust estate, and also as to that part thereof set apart in favour of my said wife after her death; and as to such part thereof as should be no longer required to be set apart in consequence of her second marriage," upon the trusts in the will declared; which were, as to one moiety, for the benefit of the three children of the testator's daughter *Jane T. Carmichael* in equal shares, with other trusts in case of their dying under the age of twenty-one unmarried; and as to the other moiety, for the benefit of his daughter *Zara* and his other daughters.

The testator died in July, 1869. The bill was filed in 1871 by *Zara*, who was the only child of the testator who survived him, for the administration of his estate.

The yearly income of the trust estate did not amount to £1200, and the principal question in the suit was whether the widow, who had not married again, was entitled to have the deficiency raised out of the corpus of the estate.

The testator's real estate had not been sold, but remained in the state in which it was at the time of his death.

The Vice-Chancellor held that the widow was not entitled to have the deficiency made up out of the corpus of the estate.

An appeal was brought from this decision by an incumbrancer of the widow's interest.

Farwell, for the Appellant:—

The rule is clearly established that where there is an actual gift of the annuity, the annuitant is entitled to have the deficiency made up out of the corpus; and there is a further rule that where the investment which produces the annuity is treated as part of the residue, the residuary legatee can only take it subject to the payment of all arrears of the annuity, so that in that case also the deficiency is payable out of the corpus. *In re Mason* (1); *Wright* v. *Callender* (2); *In re Tootal's Estate* (3); *May* v. *Bennett* (4); *Mills* v. *Drewitt* (5); *Perkins* v. *Cooke* (6); *Bright* v. *Larcher* (7). In the present case we have first, a direct gift of the annuity. Secondly, a direction to pay on certain fixed quarter days, one of which might happen directly after the testator's death and before any investment could have been made. Thirdly, the gift of the £5000 to *Zara Gee* made "subject to the investment," which is the annuity. Fourthly, the investment is made part of the residue. Fifthly, there is a blended fund of capital and income, which is to be invested for payment of the annuity. All these circumstances shew that the testator intended a gift of an annuity of £1200, not merely the annual income of a particular fund.

W. Pearson, Q.C. (*V. Hawkins* with him), for the *Carmichael* family:—

The principle on which this question may be decided is a simple one. Wherever there is a direct gift of an annuity, and then a gift of residue, whether there be a direction for investment or not, the annuitant is entitled to full payment of the annuity and the residuary legatee can take nothing till he is paid. And on the other hand where there is no direct gift of the annuity, but a sum is directed to be set apart to produce an annual sum, and after the death of the annuitant the corpus is given over, the annuitant is only entitled to the income. In the present case there is no direct gift of the annuity; the words must be taken according to

(1) 8 Ch. D. 411.
(2) 2 D. M. & G. 652.
(3) 2 Ch. D. 628, 633.
(4) 1 Russ. 370.
(5) 20 Beav. 632.
(6) 2 J. & H. 393.
(7) 3 De G. & J. 148.

C. A. 1879 GEE v. MAHOOD.

their grammatical construction. The word "which" does not refer to the annuity, but to the investment set apart to answer it. The fund is given to the widow for her life, and after her death it is given specifically to the *Carmichael* family and *Zara Gee*. It is true that it is given to the same persons as those to whom the residue is given, but it is not made part of the residue. In all the cases relied on by the other side there has been not only a direct gift of the annuity but a gift over of the fund as part of the residue. In the present case there is neither: *Baker* v. *Baker* (1) and *Tarbottom* v. *Earle* (2) are distinctly in point. The whole frame of the will shews that the testator was dealing with the income only and meant the capital to be invested and to remain intact.

Maidlow, for the Defendant *Mahood*.

JAMES, L.J. :—

With all deference to the Vice-Chancellor's judgment in this case, and with all respect for the argument which Mr. *Pearson* has addressed to us, I cannot bring myself to doubt that the real meaning of this will is what has been called the grammatical construction of it. The grammatical construction of the will is this: the testator says, "I direct my trustees to invest sufficient of my estate to produce an annuity of £1200 a year, which I give to my wife." There is no magic in the position of the words, whether he says I give it or direct it to be invested, it is the same thing. With regard to the plain meaning of the words of this will, it appears to me quite clear that the testator did intend to give £1200 a year to his wife for her life, and then in order to provide for that £1200 for life, which is a general legacy—it makes no difference that it is called an annuity or annual sum or yearly sum, it is a legacy of £1200 a year for so many years as she shall live, that is what the testator has given her—in order to provide for the legacy of so many sums of £1200, he directs his executors and trustees to sell the estate as they shall think fit, and from time to time as they shall think fit to make investments and change those investments; but in the

(1) 6 H. L. C. 616. 4 Jur N S 491 (2) 11 W. R. 680.

meantime he says she is to have the annuity and the annuity is to be paid to her on the first quarter day after his death, and in a particular event that annuity is reduced to another sum which he still calls an annuity of £150 to be paid to her. There is the actual express gift to her of an annuity of £1200 a year, and that is what remains now to be paid to her from the first quarter day.

Now, Mr. *Pearson's* argument is, that we are to say that this does not mean £1200 a year to be paid quarterly, but it means she is to have the income of the investment which may not be made for years, she is to have nothing but the income of an investment which is to be made as the trustees shall find it convenient in the proper and due exercise of their trust to be obtained by realizing the estate. That is not construing the words, but it is introducing an entirely new phrase without any ground for it. He does not say, "I direct the trustees to make an investment so as to produce £1200 a year, and I give her the income of those investments"—nothing of the kind is said. The question is, are we to put those words into the will which we do not find? I am of opinion it is an unreasonable thing to suppose that the testator intended that his wife should have nothing until the investment was made, and that if the investment produced more at some time, she was to have more. It seems to me on that point, which is the foundation of the argument, Mr. *Pearson's* contention fails.

But it is said, that from the language of the gift over you may see that it was intended she should only have the income. I see nothing in the gift over. It is said that it is a gift distinct from the residuary gift; but I cannot bring my mind to doubt it is really, with all deference to the Vice-Chancellor, an entirely residuary gift. The testator thought the residue would be payable at different times. First, he said, "When you invest, invest enough to produce £1200 a year, and £5000 for my daughter. Having done that, there may then be a residue immediately available, and I give that surplus to my residuary legatees." It seems to me you are following the words and not the spirit—that you are sticking in the bark and not in the tree—if you are to say the words, "I give that, and all that part of the residue which is set apart," have a different meaning from those which we

C. A. 1879 GEE v. MAHOOD. James, L.J.

have before us. The residue includes it, and he says I direct it shall be included.

It seems to me that the real question is, whether upon the construction of this will, it is a gift of an annuity or yearly sum of £1200 out of the estates, or only a gift of the income of particular investments, or gift of income of this particular investment, to be limited from time to time to £1200. I cannot doubt it is a gift, answering the exact description Mr. *Pearson* has given, of a pecuniary legacy measured by the number of years she shall live, multiplied by £1200.

BRETT, L.J.:—

The question in this case, it seems to me, may be thus stated: Is the wife entitled for life to an annuity of £1200 to be procured, if possible, out of the whole estate, or is she entitled for life to the income of an investment which is directed to be made? When and if that investment is once made Mr. *Pearson* wishes us to decide, or says we ought to decide, that all that she is entitled to is the income of an investment.

Now, in the first place, the terms which are used in the will are that she is to have an annuity, and the terms are not that she is to have the income of an investment. If you take the simple terms which are used in the will in their ordinary sense it is an annuity, and it is not the income of an investment. Then it is said, if you look at other parts of this will, you must see that what was intended was the income of an investment; but then, when Mr. *Pearson* was pressed with the result of such a construction, he was obliged to admit that inasmuch as here the trustees are given a discretion as to the time and mode of the investment, if they did not for a considerable time invest, the wife would not be entitled to anything until they did invest. That seemed to me to be a fatal admission, because it is not only an incomprehensible idea on the part of the testator (who certainly was providing for his wife), but it seems to be inconsistent with the terms of the annuity which is granted, as was pointed out by my Lord, at all events for the first quarter, for there is a direction that she is to be paid on the first quarter day after the death of the testator. It would be almost impossible that the investment should be made

by that time. But then Mr. *Pearson* was obliged further to admit, if his construction be true, and if the trustees were anxious to make an investment, which at the time of the investment produced £1200, that afterwards, if the income from the investment was to increase, the wife would be entitled to more than £1200, and to the full income of the investment, whatever in the result it might turn out to be. That seems also to me to be quite an incomprehensible idea on this will. Therefore, Mr. *Pearson's* interpretation, if carried out in this will, shews two results, both of them, as it seems to me, practically absurd, and one of them inconsistent with the other terms of the will. Those are tests to shew that the ordinary language is to be followed, and that this is to be held to be an annuity and not to be the income of an investment.

Now, other tests have been proposed on the one side and on the other, which have been applied in other cases to other wills, or, in other words, authorities have been cited in order to enable us if possible to construe this will. It seems to me they are cited with the usual effect, that is to say, they are inapplicable to this will. This decision will probably go into the Reports as another test applied to this will, and it will hereafter be attempted to be applied to other wills with the same effect that those have been attempted to be applied to this; that is to say, it will afford no help till you find another will practically in the same terms as this.

COTTON, L.J.:—

It is important, if any general rule of construction has been established, that the Court should not depart from such rule, but I can hardly see there is any general rule of construction laid down applicable to the present case, except this, that if there is a direct legacy of an annuity, then *primâ facie* the annuitant is entitled to have that made good, not only out of the income, but out of the capital, unless there are words sufficient to cut down the claim of the person to the income only; to which I may add that the residuary legatee, that is to say, one taking a residuary legacy, cannot take anything until all legacies have been provided for.

What has been argued in the present case by Mr. *Pearson* is, that the widow stands in the position of tenant for life of a par-

C. A. 1879 GEE v. MAHOOD. Cotton, L.J.

ticular fund set apart out of the estate, and that the fund is given after her death or second marriage as a fund separate from the residue, and not as a part of the residue. The first question we have to consider here is whether originally the gift to the widow is a gift of an annuity to be provided for in a particular way, if that way is sufficient, or whether there is a gift to her of the annual produce of the fund which is directed to be set apart.

I quite agree with Mr. *Pearson* that in considering a will you ought to deal with it as with every other document; see what the words are, and, unless there is anything plainly incongruous in so doing, put on the words their fair grammatical construction. Now, what is the will? "On further trust to set apart a sufficient portion of such investments as would produce the annuity of £1200 a year." That is the direction. Then, what is the gift to the wife? "Which I bequeath to my said wife for her life, payable quarterly" on every quarter day, "the first payment to be made and become due on the first of such days as shall happen after my decease." Now, the words of gift to the wife, if you take them grammatically and strictly, are a short expression for this: "And this annuity of £1200 a year I bequeath to my said wife." If you take it grammatically, and expand the relative by substituting the antecedent, it is a gift, not of annual income or dividends arising from the fund, for that has never been mentioned, but only of that antecedent which has been mentioned, namely, the annuity of £1200 a year. If you not only depend on the substitution of the antecedent for the relative, but also look at the rest of the sentence, it all points to the gift of the annuity as such, that is to say, of an annual sum as a legacy, and not to a gift to one as tenant for life of a particular fund, because the testator directs the first payment to be made on the regular quarter day. If you once ascertain that what is given to her is not an annuity, but a tenancy for life of an ascertained investment, no alteration can be produced in the gift to her by any direction made as to the time when it is to be paid to her. But when it is doubtful and ambiguous what the gift to her is, and of what and how she is legatee, then you must look at all parts of that which constituted her legatee. Again, when you come to the subsequent part of the gift to her, where the reduction is made in that which is to be

paid to her, it is treated throughout as an annuity, and not as a payment or gift to her as tenant for life of an ascertained fund. Again, when you come to a gift to the persons who are now contending that they can take something before the annuity is provided for, the question is are they residuary legatees? Do they take as residuary legatees, or do they take what is directed to be set apart for the annuity, as a specific sum to be handed over to them intact? Although there is a gift of an annuity, yet there may be expressions in the will that shew that what the testator has provided as a fund for payment of the annuity is to be handed over to those who are to take after the death of the annuitant in the same state as when first set apart. In my opinion all that is given to Mr. *Pearson's* clients is given to them as residue. It is true there is a reference, and an unnecessary reference, to the fund set apart to provide for the annuity given to the widow, but I agree with Lord Justice *James* that that is what is often done, namely, a gift immediately of what remains after setting apart what the testator had directed to be and contemplated would be set apart, and then a statement that the residuary legatees must wait for the enjoyment of that which he has directed to be set apart and retained until it can be seen whether or no the £1200 a year has been provided for, that is, until the death of the widow.

The case depends on the construction of the will itself, and it is unnecessary to refer to authorities, but as the Vice-Chancellor relied on the case of *Baker* v. *Baker* (1), and as Mr. *Pearson* has much pressed us with that case, I think it right to refer to it. That case, in my opinion, is entirely different. It was the same in principle, because there, on the construction of the will, the Court held that the widow was tenant for life only of a particular fund, and that it was given after her death as a fund intact, so that she could have no claim on the corpus of the fund of which she was tenant for life, and the words of the will in that case bear that interpretation, because there was a direction to set apart such a sum of money as when placed out or invested would realize a clear annual sum of £200, and a direction, without any gift of annuity to the widow, "to permit and suffer my said wife to

(1) 6 H. L. C. 616.

C. A. 1879 GEE v. MAHOOD. Cotton, L.J.

receive and take such dividends, interest, or annual income by two equal half-yearly payments for and during the term of her natural life, provided she shall so long continue my widow, but not otherwise. And from and after her decease or second marriage, whichever shall first happen, it is my will and I further declare that in case I shall die without issue the said trustee shall stand possessed of the said principal or trust moneys, and the stocks, funds, and securities in or upon which the same shall be invested upon trust for" certain named persons. Although those afterwards took the residue, this was not given as part of or in conjunction with the residue or under the gift which gave them the residue, but as a separate and distinct fund; and the direction as to the widow is the ordinary direction to pay her the dividends and income as tenant for life. That is a clear case of a tenant for life of a fund, the amount of which was to be ascertained by the annual income which it would produce, and is not the case of a gift to the widow of an annuity, and of a gift subject to her annuity, or of a gift to persons to take as residuary legatees.

Solicitors: *Stokes, Saunders, & Stokes; Hicks & Co.; Billinghurst & Wood.*

C. A. 1879 V.-C. H. *April* 8. C. A. *May* 20.

In re BENTHAM MILLS SPINNING COMPANY.

Company—Transfer of Shares—Registration—Articles of Association—Companies Act, 1862, *Table A*, *Arts.* 10, 13.

The 10th clause of Table A of the schedule to the *Companies Act*, 1862, does not apply to persons claiming shares by transmission under the 13th clause. Therefore, where a company has adopted Table A as its articles of association, it cannot refuse to register the name of a trustee in bankruptcy of a shareholder on the ground that the shareholder is indebted to the company.

Decision of *Hall*, V.C., reversed.

THIS was a motion on behalf of *O. H. Caldecott*, the trustee of the separate estate of *W. W. Hoyland*, a member of the *Bentham Mills Spinning Company, Limited*, under proceedings for the liqui-

dation of his estate, that the register of members of the company might be rectified by entering therein the name of *O. H. Caldecott* as a member of the company, in respect of 855 shares, in the place of *W. W. Hoyland*, in whose name the shares were standing; and that the company might be ordered to pay to *O. H. Caldecott* his costs of this application, together with such damages as he might have sustained by reason of the company's refusal to rectify the register.

On the 31st of August, 1878, *W. W. Hoyland*, jointly with his partner, *I. U. Zimmerman*, commenced proceedings for liquidation by arrangement of their estate, and *O. H. Caldecott* was appointed trustee of the separate estate of *W. W. Hoyland*.

At the meeting under the liquidation held on the 27th of September, 1878, the managing director of the company proved against the joint estate of the debtors for a debt of £2608 8*s.* 7*d.* due to the company from the firm. The trustee deposed that *W. W. Hoyland* was not indebted to the company in any sum whatever, except as a partner of the firm.

Application was made to the company, on behalf of the trustee, to register his name in their books in the place of *Hoyland* in respect of the shares; but the company refused to do so until the debt from the firm had been paid. The trustee accordingly made the present application to Vice-Chancellor *Hall*.

The company's articles of association were in the form given in Table A to the *Companies Act*, 1862.

Clause 10 of Table A is as follows: "The company may decline to register any transfer of shares made by a member who is indebted to them."

Clause 13 provides that "Any person becoming entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may from time to time be required by the company."

Clause 14 provides that "Any person who has become entitled to a share in consequence of the death, bankruptcy, or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have

C. A. 1879

In re BENTHAM MILLS SPINNING COMPANY.

some person to be named by him registered as a transferee of such share."

Clause 15 provides that "The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share."

And clause 16 provides that "The instrument of transfer shall be presented to the company accompanied with such evidence as the directors may require to prove the title of the transferor, and thereupon the company shall register the transferee as a member."

Dickinson, Q.C., and *J. R. Brooke*, in support of the motion.

W. Pearson, Q.C., and *Burton Buckley*, for the company.

HALL, V.C.:—

It appears to me that the proper construction of the 10th of the articles of association of the company, which is the same as the 10th clause of Table A of the 1st schedule of the *Companies Act*, 1862, is that the company is not compellable to transfer these shares, or to enter the name of the trustee in bankruptcy on the register, until all that is due from the shareholder has been satisfied. The contention has been that the debt being not that of the shareholder only, but of the firm of which he was a member, the 10th clause is inapplicable. It appears to me that a shareholder is not the less a debtor to the company because his partner is also indebted. I cannot insert in the clause "by a member who is indebted to them in respect of the particular shares;" or "who is indebted to them being the sole debtor." The words "jointly and severally" have been introduced into the modern forms of articles of association from the anxiety of draftsmen to prevent questions arising; but I do not consider the insertion of these words prevents the words here used having put upon them the interpretation which they would otherwise receive. In the *City Bank Case* (1) the decision turned upon the construction of a particular letter, and it is not, I think, an authority adverse to the opinion I have above expressed.

(1) 3 D. F. & J. 629.

C. A.
1879
In re BENTHAM MILLS SPINNING COMPANY.

It is said that clause 13 entitles the applicant to be registered. If this be so, the applicant will be able to transfer without payment of the debt, without payment of which the bankrupt could not have transferred, because "he will not be indebted to the company" as mentioned in clause 10. Take the case of a spinster: can she marry and thereby enable her husband to claim a right to transfer her shares without payment of her debt to the company? I think that the 13th and 14th clauses should be read in connection with as well the 10th as the 15th and 16th clauses, and that it was not intended to put the executor or administrator, husband or trustee, in a better position than the person in whose right he has become entitled, the security of the company being thereby destroyed.

C. A.

From this decision the trustee appealed. The appeal was heard on the 8th of April.

Dickinson, Q.C., and *J. R. Brooke*, for the Appellant:—

The Vice-Chancellor decided the case on the ground that it came under the 10th clause of the articles. But that is an error. That clause refers to transfers by deed, but the title of the trustee is by operation of law; he takes the shares by transmission, not by transfer: *City Bank Case* (1). The trustee therefore claimed to be registered under the 13th clause of the articles, and there is no clause enabling the company to refuse to register a person on whom the shares have devolved under that clause; provided only that he produces the proper evidence of his title, which is not questioned in this case. The 13th and 14th clauses belong to a different series of clauses to the 10th.

Burton Buckley (*W. Pearson*, Q.C., with him), for the company:—

The transmission of a share to an executor or to a trustee of a bankrupt is a transfer by operation of law, and therefore comes within the 10th clause, which is intended to include any substitution of one member for another. If otherwise, the result would be that the trustee, when registered, would be able to transfer the shares free from any debt due to the company from the debtor,

(1) 3 D. F. & J. 629.

C. A. 1879 *In re* ENTHAM MILLS COMPANY.

although the debtor himself would not have been able to do so; and would thus lose their security for the debt due from the debtor This could not have been the intention of the Legislature in framing Table A.

JESSEL, M.R.:—

This is an appeal from Vice-Chancellor *Hall*, and it does not appear to me that the exact point was present to his Lordship's mind, judging from the expressions made use of in his judgment. The exact point is this: the trustee of a bankrupt who was a member of a company asks to be admitted as a member of the company; he does not ask for any transfer at all, but he asks to be admitted under the 13th rule of Table A. [His Lordship read it.]

There is no doubt that he produced the evidence of being the trustee in bankruptcy, but nothing turns upon it. The words used distinguish the two alternatives; instead of becoming a member, he may if he likes transfer the shares without becoming a member. Under the title "transfer of shares" we find a different set of rules from those found under the title "transmission of shares." The clauses as to the "transfer of shares" begin by stating what instrument shall be executed and registered; the 9th clause gives the form of the transfer; and the 10th is this: "The company may decline to register any transfer of shares made by a member who is indebted to them." Now there is neither a transfer in this case nor a transfer by a member for the member's own benefit; he did not transfer, but the operation of the bankruptcy laws and Table A gave a right to the trustee to call upon the company either to admit him as a member or to allow him to transfer. But in this particular instance you neither have a transfer of shares made at all nor made by a member, and therefore it appears to me plain that rule 10 does not apply, and consequently the Appellant is entitled to be admitted as a member.

JAMES, L.J.:—

I am of the same opinion. In Table A the word "transmission" is put in in contradistinction to the word "transfer." One means

a transfer by the act of the partners, the other means transmission by devolution of law.

C. A. 1879 *In re* BENTHAM MILLS SPINNING COMPANY.

BRETT, L.J.:—

I am of the same opinion.

Solicitors: *Burton, Yeates, & Hart,* agents for *Johnson, Barclay, & Johnson, Birmingham; Phelps, Sidgwick, & Biddle,* agents for *Sale & Co., Manchester.*

In re PILCHER.

PILCHER *v.* HINDS.

[1879 P. 310.]

C. A. 1879 FRY, J. *May* 3. C. A. *May* 21.

Practice—Joinder of Causes of Action—Leave of Court—Enlarging Time—Rules of Court, 1875, *Order* XVII., *r.* 2; *Order* LVII., *r.* 6.

An application for leave to join another action with an action for the recovery of land must be made before the writ is issued.

Where another action had been joined with an action for the recovery of land without leave, the Court refused to grant leave to continue the action in that form although the Defendants had appeared.

The rule which enables the Court to enlarge the time for doing an act is not applicable to such a case.

Decision of *Fry,* J., affirmed.

THE writ in this action was issued on the 31st of December, 1878, for the administration of the estate of *Thomas Pilcher,* of whose will the Defendants *Hinds* and *Ball* were the executors, and for the recovery of three freehold messuages in the possession of the Defendants *Smith, Blatcher,* and *Thomson.*

The Plaintiffs issued and served the writ without having obtained the leave of the Court to join the causes of action which is required by Rules of Court, 1875, Order XVII., rule 2.

The Defendants, however, appeared to the action, and on the 7th of April the Plaintiffs took out a summons in Chambers "to continue the action in its present form." The summons was adjourned into Court before Mr. Justice *Fry.*

C. A.
1879
In re PILCHER.
PILCHER *v.* HINDS.

Oswald, in support of the summons:—

Under Order XVII., rule 2, leave for joining these actions is necessary, and no doubt leave should have been obtained before the writ was issued; but under Order LVII., rule 6, the Court has power in all cases to enlarge the time. The statement of claim has not been delivered: *Whetstone* v. *Dewis* (1).

Stallard, for the Defendants *Smith*, *Blatcher*, and *Thomson*, opposed.

FRY, J.:—

The Plaintiffs are now asking for leave to do what they have already done. The Defendants object that this application is too late, and that leave ought to have been obtained before the writ was served. In my opinion that is so, as the Plaintiffs' course is pointed out by the words of Order XVII., rule 2; and such I understand to have been the practice in the office of the Record and Writ Clerks. Order LVII., rule 6, has been referred to, but that relates merely to enlarging time, which is a very different matter. I dismiss this summons with costs.

From this decision the Plaintiffs appealed. The appeal was heard on the 21st of May, 1879.

Oswald, for the Appellants:—

The joinder of an action for recovery of land with another action is within the discretion of the Judge, and there is nothing in the rules to prevent that discretion from being exercised after the writ has been issued as well as before. Under Order LVII., rule 6, the Judge has power to enlarge the time where there has been a slip of this nature: *In re Jones* (before the Master of the Rolls, Feb. 12th, 1877); *In re Paragon and Spero Mining Company* (2).

Stallard, for the Defendants *Smith*, *Blatcher*, and *Thomson*, was not called on.

(1) 1 Ch. D. 99. (2) 10 W. R. 76.

C. A.
1879
In re PILCHER.
PILCHER *v.* HINDS.

JESSEL, M.R.:—

This is an application for indulgence in consequence of a slip in practice. Under the Rules of the Supreme Court no other action can be joined with an action for the recovery of land without leave of the Court. The Plaintiffs have not been put to a disadvantage by the new Rules, because these causes of action could not have been joined at all under the former practice. It was not possible formerly to join any other action with an action for the recovery of land, but now it is left to the discretion of the Judge whether this should be done. In practice leave is only given when the causes of action are proper to be joined, when they arise out of the same state of circumstances. Of course, if such a writ cannot be issued without leave, that leave must be given before the writ is issued. This is clear, both because there is no power to issue the writ at all before leave has been given, and also because, if leave is refused, it gives an opportunity for amendment. In the present case the writ was issued without leave, then the Defendants appeared, and afterwards the Plaintiffs applied for the leave, when it was too late.

The rule which enables the Court to extend the time appointed by the Rules is not applicable to such a case as this. It only applies where a limited time is fixed for something to be done, not where it is ordered that some act must be done before another.

Then with respect to the general power which the Court has of relaxing the rules, that power can only be used in special cases. But here no special case is made out. There is nothing to counterbalance the importance of having the rules strictly observed. I am therefore of opinion that this appeal must be dismissed with costs.

JAMES and BRETT, L.JJ., concurred.

Solicitors: *E. Kimber; Duncan, Warren, & Co.*

C. A. 1879 June 12.

Ex parte PATERSON. *In re* THROCKMORTON.

Trustee in Bankruptcy—Disclaimer—Expired Lease—Leave of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23—*Bankruptcy Rules*, 1871, *r.* 28.

22 Ch D 416
42 3-4, 5-7

A lease of a house was vested in a bankrupt as assignee. The trustee in the bankruptcy did not disclaim the lease, but he did not take possession of the property or exercise any act of ownership over it. The bankrupt continued to live in the house, his friends paying the rent for him. After the expiration of the term the lessor sued the original lessee on his covenant to repair, claiming £400 damages. The lessee served a third party notice on the trustee, claiming to be indemnified by him, as assignee of the term, against all breaches of the covenant since the date of the bankruptcy and the trustee's appointment. The trustee then applied to the Court of Bankruptcy for leave to execute a disclaimer in respect of the lease. The lessor opposed the application, and the Registrar refused it on the ground that the lease had expired. The trustee appealed, giving notice to the lessor, who did not appear on the hearing of the appeal:—

Held, that leave to disclaim might be given, as it could not prejudice the rights of any person who was not before the Court.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

By an indenture dated the 20th of May, 1871, *J. G. Scott* demised to *G. N. Taylor* a house and premises, and the fixtures and furniture therein, for the term of seven years from the 15th of July, 1871, at a yearly rent of £249. The lease contained a covenant by *Taylor* to repair the demised premises. On the 21st of July, 1873, *Taylor* assigned the premises comprised in the lease to *Richard Throckmorton* for the remainder of the term, *Throckmorton* covenanting to perform the covenants contained in the lease, and to indemnify *Taylor* in respect of any breach thereof. *Throckmorton* was adjudicated a bankrupt on the 26th of October, 1876. He continued to live in the house, the rent being paid for him by his friends. The lease was mentioned in his statement of affairs, but he said that he did not consider it of any value. The trustee did not take possession of the demised premises, or exercise any act of ownership over them, and no application was made to him by the lessor requiring him to disclaim the lease. On the 17th of December, 1878, *Scott* commenced an action in the

Followed Explained Ex p Hawke Dyke Re Thorne 22 Ch D 416 C A

Queen's Bench Division against *Taylor*, claiming £400 damages for breach of the covenant to keep the demised premises in repair. On the 27th of February, 1879, *Taylor* served on the trustee a third party notice, under the provisions of Rules of Court, 1875, Order XVI., rule 17, stating that he claimed to be indemnified by the trustee, as assignee of the term, against all breaches of the covenant in the lease since the date of the bankruptcy and the appointment of the trustee. On the 21st of March, 1879, the trustee applied to the Court of Bankruptcy that he might be at liberty to execute a disclaimer in respect of the lease. The lessor appeared by counsel, and opposed the application, and the Registrar refused it, on the ground that a disclaimer could not be executed of a lease which had expired. The trustee appealed. The notice of appeal was served only on the lessor.

Yate Lee (*Jelf* with him), for the Appellant:—

Sect. 23 is wide enough in its terms to authorize a disclaimer in such a case; the object is to enable the trustee to get rid of every liability resulting from contracts of the bankrupt. Rule 28 of the Bankruptcy Rules, 1871, which requires the leave of the Court to be obtained for a disclaimer of a lease, was only intended to protect the lessor. The lessor does not now appear, and it is understood that his claim has been satisfied by his lessee. Suppose a lease expired within a week after the appointment of the trustee, ought he to be personally liable in respect of breaches of covenant because he did not at once disclaim the lease, before he had had an opportunity of learning anything about it?

[JAMES, L.J.:—How can you disclaim that which does not exist?]

It is not more impossible than it is to assume, as sect. 23 provides, that a lease which is disclaimed shall be deemed to have been surrendered at a time since which rent may have been paid. Difficulties must arise when an act is to be treated as being in law that which in fact it is not: *Ex parte Brook* (1). A disclaimer can affect the rights of no one but the landlord and the trustee: *Smyth* v. *North* (2). There it was held that the disclaimer of a

(1) 10 Ch. D. 100, 110. (2) Law Rep. 7 Ex. 242.

C. A. 1879

Ex parte PATERSON. *In re* THROCKMORTON.

lease by the trustee of an assignee did not affect the rights and liabilities *inter se* of the lessor and original lessee. If *Taylor* is injured by the disclaimer, he will have a right of proof in the bankruptcy. The trustee will be personally liable as assignee of the lease by operation of law, unless he is allowed to disclaim. If it can be said that there is now a lease to disclaim, it is a proper case for giving leave to disclaim; if there is nothing in the nature of a leasehold interest to disclaim, the trustee can disclaim without leave.

No one appeared for the lessor.

JAMES, L.J.:—

So far as the Court is concerned you are at liberty to disclaim. We shall not be prejudicing the rights of any persons who are not before us by giving you leave. But we express no opinion as to those rights.

BAGGALLAY, L.J., and THESIGER, LJ., concurred.

The order as drawn up was as follows:—

This Court doth order that the order made by Mr. Registrar *Hazlitt*, and dated the 21st day of March, 1879, be discharged. And it is ordered that the trustee have leave to execute a disclaimer so far as the formal leave of the Court is required for such purpose, but not so as to prejudice by the expression of any opinion of this Court any person other than the Respondent as to the effect of such disclaimer.

Solicitors: *Peacock & Goddard.*

Ex parte CHALMERS. *In re* SAWERS.

C. A. 1879 June 12.

Practice—Bankruptcy Petition—Representation of Debtor's Estate—Appeal by Receiver before Appointment of Trustee.

After the presentation of a bankruptcy petition and the appointment of a receiver, but before the appointment of a trustee, an order was made that the receiver should deliver up to the applicants some bills of exchange which had come into his hands, on the ground that they did not form part of the debtor's estate. Notice of the application had been addressed to the receiver, the debtors, and the petitioning creditor. Notice of appeal was given in the name of the receiver alone :—

Held, that the notice must be amended by naming the debtors and the petitioning creditor also as Appellants.

This having been done, the order was affirmed on the merits.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

A partnership, consisting of *James Sawers*, of *Liverpool*, and six other persons, carried on business at *Liverpool* and in *London* under the firm of *James Sawers & Co.*, and at *Valparaiso* and other places in *South America* under the firm of *Sawers, Woodgate, & Co.* Three of the partners resided in *Liverpool;* the others resided in *South America.* On the 19th of October, 1878, *James Sawers & Co.* stopped payment, and placed their books and the management of their affairs in the hands of Messrs. *Chalmers & Wade*, accountants at *Liverpool.* Afterwards a bankruptcy petition was presented in the *London* Bankruptcy Court against all the members of the firm of *James Sawers & Co.*, and *A. W. Chalmers* was appointed receiver and manager under the petition. On the 6th of February, 1879, notice was given by a firm of *A. Edwards & Co.*, of *Valparaiso*, of an application to the Court for an order that the receiver and manager should hand over to the applicants certain bills of exchange for sums amounting to £21,032 18*s.* 1*d.*, which, at the date of the suspension of *James Sawers & Co.*, were on their way as remittances from *A. Edwards & Co.* to *James Sawers & Co.*, and which had since been received, on the ground that these bills had been specifically appropriated to certain purposes, and did not form part of the general estate of

C. A. 1879 *Ex parte* CHALMERS. *In re* SAWERS.

James Sawers & Co. This notice was addressed to *James Sawers & Co.*, to the receiver, and to the petitioning creditor, and it stated that the Court had fixed the 17th of February, 1879, for the hearing of the application. On the 9th of March, 1879, an adjudication of bankruptcy was made against those partners in the firm of *James Sawers & Co.* who were resident in *England*. On the 22nd of March, 1879, the Registrar made an order in accordance with the terms of the notice. Notice of appeal from the order was given by the receiver alone. No trustee had been appointed under the petition.

Southgate, Q.C., *Robinson*, Q.C., and *Yate Lee*, for the Appellant.

Benjamin, Q.C., *Winslow*, Q.C., and *Everitt*, for *Edwards & Co.*

THE COURT (*James*, *Baggallay*, and *Thesiger*, L.JJ.) doubted whether the receiver sufficiently represented the estate of debtors.

The receiver's solicitors stated that they had authority to appear for the English members of the firm, and for the petitioning creditor.

THE COURT said that the notice of appeal must be amended by adding *Sawers & Co.* and the petitioning creditor as Appellants, they having been Respondents in the Court of Bankruptcy.

The appeal was then heard on the merits, and was dismissed.

Solicitors for Appellants: *Gregory, Rowcliffes, & Rawle*, agents for *Hill & Dickinson, Liverpool.*

Solicitors for Respondents: *Clarkes, Rawlins, & Clarke.*

GRIFFIN *v.* ALLEN.

C. A.
1879
June 18.

Practice—Costs of Abandoned Notice of Appeal.

The costs of an application for the costs of an abandoned notice of appeal will not be allowed unless a previous demand for payment of them has been made and not complied with.

IN this case the Master of the Rolls, at the trial on the 3rd of December, 1878, dismissed the action. On the 24th of December the Plaintiff's *London* agent, being under an erroneous impression that the time for appealing was twenty-one days, served notice of appeal. Finding that this view was erroneous, he did not set down the appeal, but awaited instructions from the country as to appealing, and communications went on between the solicitors of the Plaintiff and the Defendant on the footing of the appeal being abandoned. On the 10th of May, 1879, the Plaintiff served a fresh notice of appeal, which was set down.

The Defendant now moved that the Plaintiff might be ordered to pay to the Defendant his costs of the notice of appeal of the 24th of December, 1878, as an abandoned motion, and that the notice of appeal dated the 10th of May, 1879, might be taken off the file and the appeal struck out of the list. The latter part of the application turned upon special circumstances, and does not appear to call for a report.

Chitty, Q.C., and *W. Gregory Walker*, for the motion.

Davey, Q.C., and *H. C. Deane*, for the Plaintiff.

JESSEL, M.R.:—

As regards the first part of the application, we wish it to be understood as the rule of the Court, that henceforth the costs of an application for the costs of an abandoned notice of appeal will not be allowed unless the applicant has made a previous demand for payment which has not been complied with.

BAGGALLAY and THESIGER, L.JJ., concurred.

Solicitors: *Morley & Shirreff; Allen & Son.*

C. A.

1879

July 3.

Ex parte BATES. *In re* PANNELL.

Proof—Contingent Liability—Covenant to pay Annuity—Valuation—Death of Annuitant after Payment of Dividend—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.

13 Ch D 264
17 Ch D 339
— 345

A bankrupt had covenanted to pay a life annuity to trustees for the benefit of his wife. The annuity was valued, and proof was made by the trustees for the amount thus ascertained, and a dividend was paid to them. The wife died, and the dividend which the trustees had received exceeded the amount of the payments of the annuity which the bankrupt would have had to make if he had remained solvent:—

Held (reversing the decision of the Registrar), that the trustees could not be called upon to refund the excess of the dividend above the payments of the annuity which accrued due during the wife's life.

Ex parte Wardley (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

In the year 1874 Mrs. *Pannell*, the wife of Mr. *Charles Pannell*, petitioned the Divorce Court for a judicial separation. On the 7th of July, 1874, certain terms of arrangement were agreed to upon which all further proceedings in the suit were to be stayed, and on the 23rd of July, 1874, a deed was executed to carry out the arrangement. This deed was made between *Pannell* of the first part, Mrs. *Pannell* of the second part, and *Thomas Bates* and *John Gibbs*, as trustees, of the third part. The deed contained (*inter alia*) a covenant by *Pannell* that he, his executors, administrators, or assigns, should, during the life of his wife, pay a yearly sum of £200 to the trustees, to be held and applied by them on trust for the wife for her separate use.

On the 18th of September, 1876, *Pannell* was adjudicated a bankrupt.

The trustees of the deed tendered a proof for £3493, the amount at which the annuity of £200 had been valued by an actuary as at the date of the adjudication. This proof was admitted.

The trustees also tendered a proof for £148, arrears of the annuity due at the date of the adjudication. This proof was also admitted.

(1) 6 Ch. D. 790.

The trustee in the bankruptcy afterwards paid to the trustees of the deed the sum of £698 12*s.*, being a dividend of 4*s.* in the pound in respect of the proof for the value of the annuity. On the 21st of September, 1878, Mrs. *Pannell* died. On the 25th of March, 1879, the trustee in the bankruptcy applied to the Court for directions as to dealing with the proof for £3493.

The Registrar ordered that the trustees of the deed should repay to the trustee in the bankruptcy the sum of £297, being the difference between the sum of £698 12*s.* (the dividend received by them in respect of their proof for £3493) and the sum of £401 12*s.*, the amount of the payments of the annuity which accrued due to Mrs. *Pannell* under the covenant, from the date of the order of adjudication to the day of her death, and that no further dividend should be paid in respect of this proof.

The executor of Mrs. *Pannell's* will appealed from the order.

Lush, for the Appellant:—

The Registrar proceeded on the authority of *Ex parte Wardley* (1). In that case a marriage settlement provided that the trustees should apply the income of a sum of £5000 in the first instance in paying the premiums on certain policies on the husband's life, or so much thereof as the husband should neglect to pay. And there was a covenant by the husband to pay the premiums. He paid the premiums for a time, but ultimately he failed to do so, and filed a liquidation petition; and after this the trustees paid the premiums. They proved in the liquidation for the estimated value of the husband's covenant. A dividend was declared, but before the trustees had received it on their proof the husband died.

The Chief Judge held that the trustees were not entitled to receive the whole dividend (which exceeded the amount which they had actually paid for premiums), but only the amount which they had actually paid, together with the interest which the dividend had been making since its declaration.

In the present case the dividend has been actually paid, so that there is a distinction between it and *Ex parte Wardley*. But, if necessary, this Court can overrule *Ex parte Wardley*. Sect. 31 of the *Bankruptcy Act*, 1869, distinctly provides that a contingent debt or liability of the bankrupt shall be valued, and that "the

(1) 6 Ch. D. 790.

C. A. 1879

Ex parte BATES.

In re PANNELL.

amount of such value when assessed shall be provable as a debt under the bankruptcy."

[He was stopped by the Court.]

F. G. Bagshawe, for the trustees of the deed.

Doria, for the trustee in the bankruptcy:—

The proof was made for the purpose of providing a fund to answer the annuity as it should become payable. It has been paid in full. If the whole of the dividend is now to be retained, the trustees of the deed will have received from the husband's insolvent estate more than they could have got from him if he had remained solvent. They will get more than 20*s.* in the pound, while the other creditors will get less. This is contrary to the equality which is the principle of the administration in bankruptcy. The Registrar's decision is founded on *Ex parte Wardley* (1).

JAMES, L.J.:—

I do not think it is necessary for us to decide what ought to be done in the exact state of facts which arose in *Ex parte Wardley*. There the Chief Judge appears to have thought that the case was like that of a debt, for which the bankrupt and another person were liable, being paid by that other person. But the present case is simply that of an annuity payable by *A.* to *B.* The provision of the statute is plain. It says that such future or contingent debts or liabilities of a bankrupt are to be valued in the best way possible, and that, when the value has been ascertained, the sum so assessed is to be provable as a debt in the bankruptcy. The statute has converted the annuity for the purpose of proof into a gross sum immediately payable, and on that sum the creditor is entitled to receive dividend; both parties, the creditor and the trustee, taking the proof for better or for worse. The order of the Registrar seems to me a direct violation of the words of sect. 31, and the case is not governed by *Ex parte Wardley*, where the circumstances were peculiar.

BRETT, L.J.:—

It seems to me that the case is governed entirely by the words

(1) 6 Ch. D. 790.

of the Act. The liability to pay the annuity was a liability contingent on the life of the annuitant, *i.e.*, contingent on the happening of a future event. It is within the precise words of sect. 31. The section says that such a contingent liability is to be provable in the bankruptcy, and says how it is to be proved. An estimate is to be made of the value, and the value so assessed is to be provable in the bankruptcy for all purposes, so long as the bankruptcy lasts.

COTTON, L.J.:—

I am of opinion that the Appellant is right. We must look at the Act and see what it provides. The liability to pay the annuity is one which could not be said to be a debt at the time of the bankruptcy. But sect. 31 says that a valuation is to be made of such a liability, and that proof is to be made for the amount so ascertained. The proof must be made for better or for worse. It might turn out to be very much for the benefit of the person proving, or it might turn out very much the reverse. In the present case it has turned out that the amount of the proof is greater than that which the bankrupt would have had to pay if he had remained solvent. But that cannot justify us in now setting aside the proof and disregarding the provisions of the Act of Parliament. It seems to me impossible to treat the proof for the value of the annuity as satisfied by dividends to an amount equal to the payments of the annuity which in fact accrued after the commencement of the bankruptcy. I suggested during the argument that possibly the trustees of the settlement might hold the surplus, after paying all the arrears of the annuity in full, on a resulting trust for the covenantor. But we cannot decide that point now. We can only decide that dividends must be paid on this proof, just as on all other proofs. The case differs entirely from that of a proof on a bill of exchange where funds have been provided from another source to pay it; then, of course, if the amount of the bill had been satisfied, the proof would be expunged.

Solicitors for the Appellant: *Truefitt & Gane.*

Solicitors for the trustee in the bankruptcy: *Stones, Morris, & Stone.*

M. R.
1878
Nov. 22.
C. A.
1879
Feb. 14.
M. R.
1879
Feb. 20, 24.

EMMA SILVER MINING COMPANY *v.* GRANT.

[1877 E. 103.]

Order for Trial of Issues—Application by Plaintiffs—Rules of Court, 1875, *Order* XXXVI., *r.* 6—*Undertaking by Plaintiff to discontinue Part of Action—Company—Liability of Promoter—Secret Profit—Allowances for Money bonâ fide expended.*

In an action against several Defendants involving various issues, the Plaintiffs having applied under Rules of Court, 1875, Order XXXVI., rule 6, for an order for two simple issues to be tried as between themselves and two of the Defendants before the rest of the action, the Court made the order on the Plaintiffs' undertaking not to seek relief against the said two Defendants in respect of any cause of action other than that covered by the issues so to be tried, and also discontinuing such portion of the action as the Court should direct.

By an agreement between the vendors of a mine and *G.*, a financial agent, the vendors agreed to sell the mine to a company to be formed by *G.* for its purchase at the price named, and that *G.* should receive 20 per cent. of the amount of the allotted capital of the company. By a second agreement between *P.*, the agent of the vendors, and *D.* (a nominee of *G.*), described as agent of the intended company, *P.* agreed to sell the mine to the company for the price mentioned in the former agreement, but no reference was made to the percentage which *G.* was to receive. Shortly afterwards the company was formed; the memorandum of association and prospectus, which were settled by *G.*, stated that its object was to carry out the second agreement and for the purchase and working of the mine, but they contained no reference to the first agreement, under which *G.* received the amount therein agreed upon. *G.* secured the services of the first directors, provided their qualifications, and launched the company. In an action by the company to make him liable for what he had received without the knowledge of the company:—

Held, that *G.* was liable for the amount of the secret profit which he had made; also, that in estimating the amount of such profit he was entitled to be allowed all sums *bonâ fide* expended in securing the services of the directors and providing their qualification, and in payments to the brokers and officers of the company and to the public press in relation to the company.

THIS was an action by the *Emma Silver Mining Company, Limited*, against the following Defendants: *Albert Grant, Maurice Grant, G. Anderson, J. H. Puleston, T. W. Park, H. H. Baxter, W. M. Stewart, R. C. Schenck*, the *Emma Silver Mining Company* (a corporation incorporated according to the laws of the State of *New York* in the *United States of America*), and Mr. *Lincoln*.

The action related to the purchase of a mine in the territory of

Utah, in the *United States*, called the "*Emma Mine*," in which, at the time of the negotiations hereafter mentioned, the Defendants *Park* and *Baxter*, who then resided in the *United States*, were interested, and the mineral property in which had been vested in the Defendant company in *America*.

In 1871 the Defendant *Park* and the Defendant *Stewart*, who also resided in the *United States*, acting on behalf of the Defendant company, came over to *England* to negotiate a sale of the said mine, and to promote a company for the purpose of purchasing the same.

On the 2nd of November, 1871, an agreement was purported to be entered into between *Park* and *Stewart* and the Defendants *Albert Grant* and *Maurice Grant*, who, as the statement of claim alleged, were then and had since been carrying on business in *London* as financiers, bankers, and promoters of companies, under the name of *Grant & Co.*, though it appeared that *Maurice Grant* was not at that time a partner in the firm or a party to the agreement which was entered into by *Albert Grant* alone under the style of *Grant & Co.*

The agreement, so far as material to be stated, was as follows:—

"Memorandum of an agreement made the 2nd of November, 1871, between *T. W. Park*, of *Vermont*, and *W. Stewart*, of *Nevada*, part owners of the *Emma Mine*, and acting under full authority from all the other owners, hereinafter called the "vendors," of the one part, and Messrs. *Grant & Co.*, bankers, of the other part, whereby it is agreed as follows:—

"1. The vendors shall sell the *Emma Mine*, and all the appurtenances, rights and privileges now held, used, and enjoyed therewith as a mine in operation, together with all the ore in hand and £46,300 in cash, to a joint stock company to be formed by *Grant & Co.* for the purchase of the property.

"2. The price to be paid for the said purchase shall be the sum of £1,000,000, one half thereof to be paid in cash at the date mentioned in the prospectus for the payment of the instalment, and upon the said mine, property, ore, cash, and appurtenances being duly transferred to and absolutely vested in the said company, and the remaining half to be paid in fully paid-up shares of the said company.

M. R.
1878
EMMA SILVER MINING COMPANY v. GRANT.

"3. The share capital of the company shall be offered to the public for subscription to the amount of £500,000, at the expense of Messrs. *Grant & Co.*, and Messrs. *Grant & Co.* shall be entitled to receive and be paid by the vendors 20 per cent. of the amount of the capital of the company which may be allotted and taken up after deducting the amount of any shares which may have to be and are repurchased."

The said agreement contained other provisions as to the allotment of shares, which were subsequently modified by an agreement of the 5th of December, 1871.

The statement of claim alleged that, upon the said agreement between *Grant & Co.* and the Defendants *Park* and *Stewart* having been entered into, *Grant & Co.*, acting as promoters of the company that was afterwards formed (being the Plaintiff company), proceeded to organise the company, and to obtain the consent of certain influential persons and firms to act as directors and officers of the same; and that they obtained the consent of the several persons therein named to become directors.

On the 4th of November, 1871, an agreement was entered into between *Park*, on behalf of "the vendors," of the one part, and *G. H. Dean*, a nominee of *Albert Grant*, described as "acting on behalf of a company then intended to be formed and incorporated under the laws of *England* by the name of the *Emma Silver Mining Company, Limited*," of the other part, for the sale of the mine to the intended company. The purchase was to include the mine therein described, with the plant, goods and chattels in and about the same, and all the stocks of ores in the mine, and the sum of £46,300, proceeds of ore sold and then in hand. The agreement stated that the purchase-money was to be the sum of £1,000,000 sterling, of which £500,000 was to be paid in cash and £500,000 in fully paid-up shares of the company. The vendors were to pay all the expenses of and incidental to the formation of the company up to the allotment of shares.

It was alleged that the Defendant *Park*, during his negotiations, prepared a prospectus to be issued by the proposed company, and that the same, as altered by the Defendant *Albert Grant*, was submitted to the persons who had agreed to become directors. The qualifications of the directors were provided by *Albert Grant*.

On the 8th of November, 1871, the Plaintiff company was formed under the provisions of the *Companies Act*. By the memorandum of association the objects of the company were stated to be "the carrying out of the agreement of the 4th of November, 1871, the purchase, acquisition, and working of the *Emma Mine*, the purchase of other lands or mines in the territory of *Utah*, and such machinery and implements as might be necessary for carrying out the working of the mines," and other objects expressed in the memorandum. The nominal capital of the company was defined at £1,000,000, divided into 50,000 shares of £20 each. By the articles the contract of the 4th of November, 1871, was expressed to be adopted by the company so far as its provisions were intended to be binding on the company therein contemplated. The articles provided that the Defendants *Park*, *Schenck*, and *Stewart*, and three others therein named, should be the first directors of the company.

At the same time that the Plaintiff company was incorporated a prospectus prepared by the Defendants *Park* and *Albert Grant* was issued inviting subscriptions for 25,000 shares of £20 each, described as the unappropriated capital of the company. In this prospectus the Defendants *Anderson*, *Schenck*, and *Puleston* were described as trustees of the Plaintiff company, and it was stated that they had consented to act as trustees for the shareholders until the property was duly transferred. This prospectus was circulated by and at the expense of *Albert Grant*, with the approval of *Park* and *Stewart*, and was based on the representations made by *Park* to them and to some of the directors.

Neither the agreement of the 4th of November, 1871, nor the memorandum and articles of association, nor the prospectus, contained any reference to the provision in the agreement of the 2nd of November, 1871, as to the payment by the vendors to *Grant & Co.* of 20 per cent. of the amount of the capital of the company, nor to any profit to be received by *Albert Grant* as promoter of the company.

Before the 1st of December, 1871, more than £400,000 had been paid to the credit of the said trustees on account of the 25,000 shares in the Plaintiff company which had been allotted to applicants according to the terms of the prospectus; but, the

M. R. 1878 EMMA SILVER MINING COMPANY v. GRANT.

trustees not having received a certificate from the solicitors of the Plaintiff company that the transfer of the property had been completed, no part of the purchase-money had then been paid to the vendors.

By an agreement dated the 1st of December, 1871, and made between *Park* and the said trustees, it was agreed that *Park* should complete and deliver all transfers and assurances required by the solicitors to the company, and give to the company actual possession of all the property, including the sum of £46,300 cash as past earnings, and that, upon the solicitors receiving notice from their agent at *New York* that the title was good, the trustees should pay the said sum to *Park*.

The statement of claim alleged that *Grant & Co.* advanced to *Park* the sum of £45,000 upon the security of the first moneys payable to the vendors in respect of the purchase-money to enable him with that and another smaller sum to place £46,300 to the credit of the Plaintiff company with their bankers, representing the same to be the produce of the ore derived from working the mine.

By a memorandum of agreement dated the 5th of December, 1871, made between *Park* and *Stewart*, described as owners of the *Emma Mine* of the one part, and *Grant & Co.* of the other part, it was agreed that certain stipulations in the said agreement of the 2nd of November, 1871, as to the allotment of the shares in the Plaintiff company should be modified, and it was further agreed, in consideration of the further services of *Grant & Co.* in carrying out the arrangement for the acquisition of the mine by the company, and the further expenses incurred by *Grant & Co.* in relation to the company, and in consideration of *Grant & Co.* agreeing to absolve *Park* and *Stewart* from all claim in respect of *Grant & Co.'s* expenses under the agreement of the 2nd of November, 1871, that the vendors of the mine should deposit with a nominee of *Park* and *Grant & Co.* all the £500,000 of fully paid-up shares in the company to which the vendors were entitled as part of the purchase-money for twelve months, unless they should be disposed of as thereinafter provided; also that *Grant & Co.* might, as long as the said shares remained so deposited, dispose of the said £500,000 of shares, unless *Park* should elect to take the

same as therein provided, and that upon every sale that might be effected of any of the said shares, *Park* should pay to *Grant & Co.* the commission of £1 per share, and should also pay, and *Grant & Co.* be entitled to retain, one-half of the net proceeds of the sale of the said shares. It was also agreed that *Park* should be at liberty to withdraw from deposit a certain number of the shares, in which case *Grant & Co.* were not to be entitled to any remuneration.

This agreement was, it was alleged, concealed from the directors of the Plaintiff company, other than *Park*, *Baxter*, and *Stewart*, and from the company.

The statement of claim alleged that on the 5th of December, 1871, the trustees, under *Park's* direction, paid to *Grant & Co.*, out of the £400,000 then standing to their credit, the sum of £145,000, and paid the balance to *Park;* also that the sum paid to *Grant & Co.* was paid on account of the £45,000 lent to *Park* as before mentioned, and on account of the £100,000 payable to *Grant & Co.* under the agreement of the 2nd of November, 1871; also that the Defendants *Park*, *Baxter*, *Stewart*, *Albert Grant* and *Maurice Grant*, or some or one of them, with the knowledge of the others, had, before the issuing of the prospectus, agreed to make the various payments or allotments of shares to the several persons in the statement of claim mentioned, out of the moneys and shares which the vendors were to receive from the company, or out of so much thereof as *Grant & Co.* were to receive as promoters, and that such sums and shares had since been paid or allotted, but concealed from the Plaintiff company. These payments included payments to brokers for sustaining the market, a sum of £10,000 paid to another firm of brokers, in lieu of a share of the profits which *Albert Grant* had agreed to give them for waiving an alleged option to purchase previously given them, and sums paid to the solicitors employed in preparing the memorandum and articles of association, and who became the solicitors of the company, and to the metal brokers and bankers whose names appeared in the prospectus, and to a gentleman who had assisted the Defendant *Albert Grant* in procuring the services of directors.

The statement of claim further alleged that the Defendants

M. R.
1878
EMMA SILVER MINING COMPANY v. GRANT.

Albert Grant and *Maurice Grant* had sold a large number of shares retained by *Park* as part of the vendors' shares at prices considerably exceeding their par value, and had received from *Park*, by way of commission and as their share of net profits under the agreement of the 5th of December, 1871, sums amounting to £32,421, of which £19,600 was received on account of commission on the shares sold by them, including those bought by them for the purpose of keeping up the market, and afterwards resold; and that the last mentioned sums were all paid to them out of the purchase-moneys received by *Park* from the Plaintiff company.

It also alleged that in calculating the said net profits the Defendants *Albert Grant* and *Maurice Grant* deducted all the sums paid by them to the directors, brokers, solicitors, and other officers of the company, as well as many other payments made by them to members of the newspaper press and others to facilitate the promotion of the company and to enable them to dispose of their shares. The statement of claim contained various charges of misrepresentation with reference to the mine, and of fraudulent concealment.

The Plaintiff company claimed a declaration that the acts of the directors of the Plaintiff company (being the nominees of and paid by and under the control of the vendors and promoters) in adopting and carrying out the agreement of the 4th of November, 1871, were not binding on the Plaintiff company, and that the purchase of the mine by the Plaintiff company might be set aside; secondly, that accounts might be taken of the profits derived by the Defendants *Park*, *Baxter*, *Stewart*, *Albert Grant* and *Maurice Grant*, or any of them, on the shares sold by them beyond the par value; and that the same Defendants and the Defendant company might be jointly and severally liable for the whole purchase-money of the mine; also, that, whether the purchase be set aside or not, the several Defendants therein named might be declared liable to the company in the various amounts mentioned, and that the various Defendants might be ordered to pay to the Plaintiff company all sums of money and the value of all shares which they respectively had obtained, and all profits which they might have derived as promoters, directors, or trustees of or for the Plaintiff company, either out of the moneys and shares to be paid and

allotted under the agreement of the 4th of November, 1871, or otherwise.

The Defendants *Albert Grant* and *Maurice Grant*, by their respective statements of defence, denied many of the allegations contained in the statement of claim. The only Defendants who had entered appearances were the Defendants *A.* and *M. Grant*, *Anderson*, and *Puleston*.

In July and August, 1878, Professor *Blake*, who had made one of the reports on the mine referred to in the prospectus, being on a visit to this country, was examined before a special examiner, and cross-examined for many days by counsel on behalf of the Defendant *A. Grant*, and the Defendant *A. Grant* afterwards applied by summons in Chambers for a commission to take evidence in *America*, and his application was supported by *M. Grant* and the Defendant *Anderson*.

1878. Nov. 22. A motion was now made on behalf of the Plaintiff company, under Rules of Court, 1875, Order XXXVI., rule 6 (1), that the following issues of fact might be tried as against the Defendants *Albert Grant* and *Maurice Grant* before the rest of the action as against them and the other Defendants, namely:—

First, whether the Defendants *Albert Grant* and *Maurice Grant*, or either of them, were or was promoters or a promoter of the Plaintiff company.

Secondly, whether any and what sums of money were received or derived by the Defendants *Albert Grant* and *Maurice Grant*, or either of them, without the knowledge of the Plaintiff company under the agreements of the 2nd of November, 1871, and the 5th of December, 1871, or either of them, or otherwise, as promoters or a promoter, from the vendors to the Plaintiff company, or out of the purchase-money payable in cash and shares by the Plaintiff company, or otherwise, for which the said Defendants or either of them were or was accountable.

(1) "The Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others."

M. R. 1878 EMMA SILVER MINING COMPANY v. GRANT.

Davey, Q.C., *C. S. C. Bowen*, and *Grosvenor Woods*, for the Plaintiff company, in support of the motion, submitted that this was a proper case for the order asked for to be made, especially as the Defendants had applied for a commission to *Utah* which would delay the trial of the action. These issues could be tried on the pleadings and on such evidence as could be at once obtained consisting almost entirely of the Defendants' own books and the admitted documents. They offered, if the issues were directed against the Defendants *Albert Grant* and *Maurice Grant*, not to seek any further relief in the action as against those Defendants except that which was included in those issues.

Moulton, for the Defendant *Albert Grant*, and *Romer*, for the Defendant *Maurice Grant*, opposed the motion.

JESSEL, M.R.:—

I do not intend to lay down any general rule for the proper construction of Order XXXVI., rule 6, because, first of all, I think one Judge has no right to embarrass other Judges by laying down general rules of construction; and, in the second place, I think it is very undesirable to limit the operation of a rule expressed in general terms by stating the circumstances, or all the circumstances under which the Judge thinks the discretion ought to be exercised. The discretion is general. Of course it is a judicial discretion, and there must be sufficient reason for exercising it; but what I intend to do is to state one or two cases in which I have been asked to put the rule in force, and what I have done, and why; and then I shall state why I think I ought to put the rule in force in the present instance.

I have been asked to do so in the case of a Defendant. The first case that came before me was a case in which a lady alleged that she was the legitimate child of somebody, and that as such she was entitled to take some very long and expensive and intricate accounts against some trustees. The trustees shewed by affidavit that the lady was born before the marriage of her parents, and that there were very strong grounds indeed for supposing that she was not a legitimate child at all. I thought it a proper case, inasmuch as the expense of taking the accounts would

have been enormous, and the whole suit would have ended in nothing but costs if the Plaintiff did not establish her legitimacy, for the issue of legitimacy or illegitimacy to be tried first under this rule. I so directed, and, as I am informed, the result was that the lady did not succeed in establishing her legitimacy, and there was an end of the action, which was exactly what I anticipated.

In a case of this kind my opinion is that the Judge must have some evidence which will make it at least probable that the issue will put an end to the action. The Plaintiff is not to be harassed at the instance of the Defendant by a series of trials, each trial taking issue on every link of the Plaintiff's case. That is not the meaning of the rule as I understand it, but it may properly be applied in such a case as that I have stated, where the Judge has serious reason to believe that the trial of the issue will put an end to the action.

I have had a case in which the Plaintiff alleged a very long title to, and claimed an estate. He alleged himself to be the heir-at-law of a person who was entitled to this estate. He wanted a great deal of discovery, and the possession of large property. The Defendant said that the Plaintiff was a pauper, that it was a mere experimental action, and that there was not a shadow of ground for his claim. In that case I felt no hesitation in directing an issue whether the man was heir-at-law. It turned out that he was not, and I believe the case was abandoned and was never tried at all.

There was a third case I remember before me at Chambers—I only give these instances as illustrations—in which a man brought an action on behalf of himself and all other the tenants of a manor to restrain the inclosure of a common. The Defendant said, "This will be a very expensive action to try; it will involve the customs of the manor as to rights of common," and that, as usual, they had put up a man, who, although not technically, was really a pauper, to sue on behalf of himself and all others, the only result of which action could be that the Defendants, if successful, would have to pay the costs out of their own pockets. They alleged and proved by affidavit that the person who was Plaintiff, and who said he was tenant of the manor, was not so, and that his name or the name of his ancestors had never appeared on the court rolls of

M. R. 1878 EMMA SILVER MINING COMPANY v. GRANT.

the manor. The only answer that I could get from the Plaintiff was that he believed he was a tenant, but he could not shew how. I thought, before the Defendants were put to the enormous expense of a trial of all the issues, it was right to put the Plaintiff to the proof that he was a tenant at the time when the action was brought.

But I do not remember before having had an application on the part of the Plaintiff, and, as far as I can learn from the inquiries I have made, no one else is aware of any such case.

Now, it appears to me that when the Plaintiff makes the application, different considerations arise. The Defendant has of course a right to shape his own case, and to say to the Plaintiff, "You must prove every part of your case; if I can put my finger on one part of your case and shew that there is no foundation for it whatever, it is quite wrong to subject me to the whole expense of a protracted investigation, and especially when you, the Plaintiff, cannot pay the costs of it." But when a Plaintiff has chosen to frame his case in this way, and has chosen to join several Defendants, because they are more or less connected with some part of the subject-matter of the action, although not connected with the whole of it, that is the mode in which he has elected to frame his case for his own convenience, and it does not then at all follow as a matter of course that he is to be at liberty to retire from it as to any portion of the case and say, "I should like to try one part of it only, and to leave the Defendant afterwards to be subject to a second or third trial to try the rest of it." I think the Defendant has, speaking generally, a right to answer, "You ought to have thought of this before you brought your action or put in your statement of claim; if you wanted any part of the action to be tried separately you should have brought a separate action." I do not wish to be understood as saying that subsequent events may not have occurred which may justify the Plaintiff in making the application, but subject to that it appears to me as a general rule that the Plaintiff has no right to make the application if the Defendant objects.

But if the Plaintiff comes into Court and says this, "Since the commencement of my action subsequent events have occurred which convince me that I had much better give up the right of

action as against particular Defendants, and limit my action to the trial of certain issues only, and ask the Court to try those issues," it does not appear to me the Defendants have any right to complain. There will only be one trial, therefore there will be no increased costs; and, as against those Defendants, they get the benefit of the abandonment of the further relief asked against them, because the Plaintiff says that he will limit his relief to what will result from the issues which are to be tried. So far as those Defendants are concerned it must be a benefit—that is, a benefit in one sense only, a benefit theoretically, because practically it is no benefit—and if they are wrong, the sooner the action is tried against them the worse for them, and the greater the delay the better for them; but I am not now putting it in that way at all. Here the Plaintiff company say, in effect, "When we brought the action we intended to try it against all the Defendants according to the terms of the agreement; and we have, according to our view, a clear case against the Defendants the *Grants* for a certain cause of action." The other Defendants, including the *Grants*, have chosen, as regards another cause of action, to apply for a commission to *Utah* in the *United States*, and the Plaintiff company say that if they succeed upon that application, the result will be that the trial of the remaining cause of action will be delayed until an indefinite period, and to avoid that they submit to limit their cause of action against the Defendants the *Grants* to the one cause of action as to which they want the issues stated. It seems to me that in some shape or other that application is reasonable and should be acceded to. It is one that, except as regards delay, cannot injuriously affect the Defendants, and it may obviously be very beneficial to the Plaintiff company if it avoids the delay of the trial of the action.

I think the case before me comes under the 6th rule of Order XXXVI., the words of which are, "The Court or a Judge may, in any action at any time or from time to time order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others." Now, if I stayed the action, it might be objected that there were no other issues to try; but there are other issues to try as between the other Defendants, and issues as

M. R. 1878 EMMA SILVER MINING COMPANY v. GRANT. C. A. 1879

to which they may desire the *Grants* to be present, and therefore I shall only put the Plaintiff under terms not to ask relief against the *Grants* in respect of any other cause of action than that included in the issues.

Then there is one other point which I think I ought to decide. I think the case to be brought within this rule ought to be one of simple issues. I do not think it is convenient to travel through a long record, and to get a number of complicated issues, and except them, so to say, from the pleadings. But in this case it appears to me the issues are simplicity itself. There are two issues in form. In reality they are only one. The real issue to be tried is whether the *Grants*, as promoters of the company, pocketed £100,000, or thereabouts, out of the purchase-money without the knowledge of the company. That is really the only question I have to try. It appears to me to be a very simple issue, which I can try very well, and therefore I shall make the order in the terms proposed.

I reserve the costs of the motion and the rest of the costs of the action, and I take from the Plaintiff company the following undertaking, to be stated in this order :—

"The Plaintiffs by their counsel undertaking not to seek relief against the Defendants *Albert Grant* and *Maurice Grant* in respect of any cause of action other than that covered by the issues, and also undertaking to consent to an order to discontinue such portion of the action as and when the Court shall direct."

C. A.

From this order the Defendants *Albert Grant* and *Maurice Grant* appealed. The appeal came on for hearing on the 14th of February, 1879.

Benjamin, Q.C., and *Pollard*, for the Defendant *Albert Grant*, and

Levett (*Romer* with him), for the Defendant *Maurice Grant*, referred to Order XXIII., and contended that if the said issues were ordered to be tried, the Defendants the *Grants* were entitled to an actual, and not to a future and contingent, discontinuance of the action as to all matters not covered by those issues.

Davey, Q.C., *C. S. C. Bowen*, and *Grosvenor Woods*, for the Plaintiff company.

M. R.]
1879
EMMA SILVER MINING COMPANY v. GRANT.

THE COURT (*James*, *Bramwell*, and *Brett*, L.JJ.) varied the order by substituting for the latter part of the undertaking these words: "The Plaintiffs discontinuing such portion of the action as the Court shall direct."

17 Ch D 128

1879. Feb. 20, 24. The issues thus directed to be tried now came on for trial. No witnesses were called, and the evidence consisted of the answers to interrogatories and the documents admitted by the Defendants' affidavits.

It appeared from these documents and the books of the Defendants *Grant*, which were produced, that the Defendant *Maurice Grant* did not become a partner with his brother until the beginning of 1872, and that in 1871 he was in receipt of a salary with a commission on profits.

The books shewed that, after deducting from the £100,000 commission payable under the agreement of the 2nd of November, 1871, a rebate of £15,000 and a sum of over £38,000 charged as expenses, and including payments to brokers for purchases of shares in order to sustain the market, a sum of £46,662 5*s.* 6*d.* was treated as profit on that account and credited as cash in the commission account under date the 30th of December, 1871. From other accounts in the books it appeared that *Albert Grant* or the firm had received as profits the sums of £45,421 6*s.* 4*d.*, £8414 0*s.* 6*d.*, £6190 12*s.* 6*d.*, and £1500, on or before the 30th of June, 1872. These sums consisted partly of the £1 per share commission payable under the agreement of the 5th of December, 1871, partly of the share of net proceeds of sale of the shares sold under that agreement, and partly of the profits made by *A. Grant* or the firm by sale of other shares in the company which he had received from *Park* under his arrangements with him, and by dealing with which he had kept up the market for the shares.

In the course of the trial the case against the Defendant *Maurice Grant* was compromised, and an order was made by consent that he should pay to the Plaintiff company the sum of £2250, with interest at £4 per cent. from the 12th of May, 1872, in satisfaction of all claims against him under the said issues or either of them.

M. R.
1879
EMMA SILVER MINING COMPANY v. GRANT.

Davey, Q.C., *C. S. C. Bowen*, *Grosvenor Woods*, and *Foulkes*, for the Plaintiff company:—

The Defendant *Albert Grant*, as the promoter of the company, stood towards the company in a fiduciary relation, and was not entitled to receive, under the agreements of the 2nd of November, 1871, or the 5th of December, 1871, any part of the purchase-money for the mine, nor any profit or commission on the shares sold by him without disclosing the same to the company: *Bagnall* v. *Carlton* (1). In this case the real purchase-money was the nominal amount of the purchase-money less the amount agreed to be returned to the promoter. In estimating the amount of the profit which he is liable to make good, although, according to *Bagnall* v. *Carlton*, a promoter is entitled to be allowed his expenses properly incurred, yet he cannot be allowed such expenses as payment to an agent for securing the services of directors, payments to the press for writing up the company, or to brokers for sustaining the market.

The Defendant *Albert Grant* appeared in person, and contended first, that the issues could not be tried at present, as there was a subsisting claim by the Plaintiff company against the Defendants for a rescission of the contract for the purchase of the mine on the ground of fraud, which was an election by the Plaintiff company to disaffirm the contract, and give up all right under it; the Plaintiff company were, therefore, precluded from now claiming against himself as promoter. Further, there was no such fiduciary relation shewn as would entitle the Plaintiff company to recover the amount paid to him as promoter, and even if he was liable, at any rate he was entitled to be allowed all sums *bonâ fide* expended by him in any way in launching the company.

JESSEL, M.R., after stating the issues he had to try, referred to the first objection taken by the Defendant *Albert Grant*, observing with respect to him:—

I must say he has taken every point which I believe he could have taken, and a good many that I think nobody could say ought

(1) 6 Ch. D. 371.

to have been taken; still he deserves the credit of having taken all points possible.

[His Lordship then expressed his opinion on the objection to the trial of the issues on the ground of the pending action for the rescission of the contract, and said that it now came too late, not having been taken either on the motion or before the Court of Appeal, and even if it could be taken now, it was, in his Lordship's judgment, quite untenable. His Lordship then continued:—]

Assuming the contract to be a valid contract, what have we here? We have, it appears to me, a case wholly undistinguishable from the case of *Bagnall* v. *Carlton* (1) on any principle. The case is a somewhat singular one in one or two of its features, but I am afraid not singular in all its general features.

[His Lordship then stated the effect of the two agreements of the 2nd and 4th of November, 1871, and the transactions connected with the purchase of the mine and the issuing of the prospectus, and continued:—]

That being the position of matters, the first point to be considered is, whether that was a transaction which on the face of it amounted in equity to a fraud. Now, a very eminent Judge has said that it is not necessary to be a lawyer in order to be an honest man, and I quite assent to that proposition; I do not think it is necessary to understand equity law in order to be convinced that it is a fraud if you tell the public that a mine is sold by the vendors for a million of money, when in fact it was agreed to be sold for a million of money less £200,000 to be retained by the real purchaser, the man who agreed that it should be sold to a company to be formed by himself, and that he should provide some small expenses. I think that such a representation is one by which the public would be deceived. Of course, if it were a real sale for a million to a person really buying, the public would suppose that they had the protection of a real purchaser, a person who, therefore, would look to some extent after the value of the thing to be bought; and when they saw a respectable list of directors, in fact something more than respectable, a distinguished list of directors, advertised, who would of course be supposed to look after their own interest in a company in which

(1) 6 Ch. D. 371.

M. R.
1879
EMMA SILVER MINING COMPANY v. GRANT.

they would take a considerable stake in the shape of shares, and in whose management they would take part, and to whose recommendation to the public they lent the sanction of their names and their high social position, they would naturally suppose that they had looked after the thing, and that they had taken care to see that the company about to be formed would have value for its money. All that appears to me untruly represented by this prospectus. It is represented as a *bonâ fide* purchase for £1,000,000, with the sanction of these eminent gentlemen as directors, when in fact it was in substance, though not exactly, a purchase for £800,000, put off on the company for £1,000,000.

In order to shew the view which has been taken by a Court of Justice of this kind of transaction, I will read a few words from the judgment of Vice-Chancellor *Bacon* in the case of *Bagnall* v. *Carlton* (1). He speaks of the prospectus, and the words apply exactly to the prospectus before me with some additions: "It wholly omits the consideration that the employment of the agent was for the purpose of forming a company, and of inducing other persons to subscribe in reliance upon a representation which was untrue; for it was not true that the purchase-money payable to the vendors was the sum mentioned in the prospectus, but it was the purchase-money stated in the ostensible agreement, minus the amount to be paid by the vendors to their agents as a reward for procuring the subscription; and the nominal purchase-money so diminished was the true sum which was to go into the pocket of the vendors." I think that the answer to that, namely, that the amount made no difference, is fallacious. The amount makes all the difference. If you represent that a sum is to be paid, you may honestly, and perhaps fairly, omit a trifling amount of commission, say 2*s.* 6*d.* per cent., for the brokerage on the stock, or anything of that kind. The rule is *de minimis non curat lex*, but where you actually take out one-fifth of the purchase-money, of course it is quite clear the amount does make that an untrue representation which might be substantially true if the amount was trifling.

Then it may be said, "But what had Mr. *Grant* to do with it?" The answer is that Mr. *Grant* was not only the promoter, which

(1) 6 Ch. D. 387.

he was by forming the company, but he was the person who made the representation. He actually settled and signed the prospectus which was issued; and again I will quote a few words from the same judgment of Vice-Chancellor *Bacon* (1): "But if the case were not supported by authority, I should not hesitate to say that the persons by whom this representation was made did by making it—by inviting and soliciting the confidence of the persons to whom it was addressed—contract fiduciary relations with those persons." That is if he took upon himself to represent to them, not the whole of the facts but a portion of the facts, and to omit what he ought to have known and must be taken by a Court of Justice to have known was a very material statement. But, as I said before, something must be added to this case. Mr. *Grant* not only formed the company, but he obtained with one exception the names of the directors, and these directors were known to him not to be independent directors.

[His Lordship then referred to the way in which the directors had been obtained.]

It is again an unfair representation to hold out to the public that this is a sale by the mine-owner to the nominee for the company, so to say, approved of and controlled by an eminent and independent body of directors. The whole of it is, in my opinion, an untruthful representation by reason of the suppression and concealment of truth, not untruthful in the sense of direct falsehood, but untruthful because it is intended to convey to the public an impression different from the reality, and because it is known by the person who conveys it, or ought to be known by him, to be materially different from that which was the real state of the case.

That being so, it appears to me that the promoter who issues such a prospectus as this, and acts in the way I have mentioned, has really nothing to complain of if his conduct is described in the way in which Vice-Chancellor *Bacon* described it in *Bagnall* v. *Carlton*.

I now come to the next question. For what sum ought Mr. *Grant* to be made liable? And that depends upon what the principle is on which the Court decides these questions. Mr. *Grant* becomes, as I understand it under the authorities, a

(1) 6 Ch. D. 386.

M. R. 1879

EMMA SILVER MINING COMPANY v. GRANT.

trustee, agent, or person in a fiduciary position as regards the company, one who has undertaken a duty towards the company of such a character as incapacitates him from making a secret profit at the expense of the company.

That he has undertaken that duty in this case I think is very plain indeed, because he not only was the person who was to form the company, but he himself bought on behalf of the company by the very first contract. The second contract again is by a nominee of his on behalf of the company, and he himself—whether he actually drafted or whether he settled and approved the memorandum and the articles of association is quite immaterial—was the person who was the author of those instruments, adopted the contract on behalf of the company, and acted from beginning to end for the company, formed it, provided it with directors, made a contract for it, and adopted that contract for it.

Now, it has been decided by a very great number of cases that a person in that position is in a fiduciary position, he is a promoter. It is not necessary that he should have done all these things to make him a promoter, even some of them would be sufficient, but he is undoubtedly a promoter, and, as a promoter, as the man who has formed the company, he cannot take a secret profit; he must let his company know what profit he has taken, and deal with them, so to say, at arm's length.

In a well-known case, the *New Sombrero Phosphate Company* v. *Erlanger* (1), Lord Justice *James* says this (2): "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent."

Let us see what the position of Mr. *Grant* was. He had a contract with *Park* and *Stewart* to buy the mine of them, and that they should sell it to a company of his nomination, and he formed the company to buy. Can he say after that, that he is not in a fiduciary position within the authorities towards that company?

(1) 5 Ch. D. 73. (2) 5 Ch. D. 118.

It is clear that he cannot. Therefore, the only question is, whether he can make any profit at all and not disclose it? Upon that the authorities are quite plain. The moment a man is in a fiduciary position, however that fiduciary position may arise, before he can retain a profit to himself he must deal with his principal on the footing of making a full and fair disclosure of everything material in relation to the dealing or transaction in which he acts in the fiduciary capacity.

The case of the *Liquidators of the Imperial Mercantile Credit Association* v. *Coleman* (1) is a very good illustration of that. There *Coleman* was a stockbroker, and he told his fellow-directors that he had an interest in the transaction. He did not tell them the extent of his interest, and it was decided that, inasmuch as his fellow-directors might have been under the impression that he merely took his ordinary commission as a stockbroker, and thereupon confirmed the transaction, he was liable to refund all his profits, because it turned out that he had made a large and extraordinary profit beyond the usual commission of a stockbroker, and it was decided that he was compellable to state not only that he had an interest, but what interest it was before he could sustain the transaction.

The case of *Bagnall* v. *Carlton* (2) is so like the present case—in fact one of the Defendants there was *Albert Grant* himself—that it is hardly possible, I think, to suggest any distinction at all in favour of the Defendant in this case.

But then the question arises, what is he liable to pay? Now, as I understand it, he is liable to pay the amount of the profit he has made. It has been argued that, though in a sense he gets part of the purchase-money, he is liable on the ground of his paying back the difference of the purchase-money. That cannot be, as it appears to me, the true ground. No doubt in substance the representation that the contract is a contract for the purchase for £1,000,000, when £200,000 is to be deducted as a commission, is substantially a misrepresentation by over-stating the purchase-money, but it does not make that commission part of the purchase-money in that sense. In other words, suppose the purchaser agrees with the vendor to confirm the contract, and takes a larger sum from him than the commission, that would not, as was

(1) Law Rep. 6 H. L. 189. (2) 6 Ch. D. 371.

M. R. 1879

EMMA SILVER MINING COMPANY v. GRANT.

decided in the case of *Bagnall* v. *Carlton* (1), affect the position of the agent who had negotiated the contract.

If it could be proved, for instance, that the original purchase-money was, we will say, £100,000, that the vendors agreed to take £90,000, and paid £10,000 as commission to the agent, and that they had refused an offer of £89,000, and if after the matter was discovered, rather than submit to exposure, or for other reasons, they agreed to a confirmation of the contract and to accept £80,000, so that the purchaser had never paid more than £80,000, the purchaser would not be the less entitled to recover £10,000 from his agent. The purchase-money is now reduced to £80,000, but he would have the right to say to his agent, "You made a profit by that position of trust and confidence which was reposed in you as agent, you cannot hold that profit as against me. Although the result of your misconduct was really to entitle me to obtain the property, and enabled me to obtain the property at a less price than I could have obtained it if you had not been guilty of misconduct, yet that advantage to me will not enure to your advantage, and cannot entitle you to retain one single shilling of the improper profit you made." It appears to me that is the true view of the case, that the person in the fiduciary position cannot keep the secret profit, and that the fact that the relations of the profit to the purchase-money originally are altered can make no difference. Indeed, we might have it the other way. The purchaser might like his bargain, and might say, "Though I have given £100,000 for this which I might possibly have bought at £90,000, I will not give it up, I will affirm the contract, I think it is worth more." He might have sold it for more a week afterwards, and yet he would be entitled to take from his own agent the commission improperly received by the agent from the vendor.

If that be the true principle, it remains to consider what is the amount of profit derived by the agent in this transaction. The broad view of the case is to take the whole transaction together, and see how much more money he has got than he would have had if he never entered into it at all.

As I read *Bagnall* v. *Carlton* (1), although the point did not arise there exactly as it arises here, I think that was the view of the Court of Appeal.

(1) 6 Ch. D. 371.

Lord Justice *James* says this with regard to the costs, charges, and expenses incurred by the Defendants (1): "The costs, charges, and expenses, I think they had a right, independently of the offer in the bill, to deduct, because what they were liable to pay the company was the profits which they had made in a fiduciary character, that is to say, the net profits which they had made, and I think that costs, charges, and expenses might properly be deducted in ascertaining the net profits, and to that extent, therefore, they were, I think, entitled, independently of the offer in the bill." Lord Justice *Baggallay* concurs.

Lord Justice *Cotton* says this (2): "That being so"—that is, as to the fiduciary relation—"the principle of equity clearly applies. *Carlton* and *Grant* are trustees for the company. They cannot, by any possibility, secretly make to themselves a profit in the transaction in which they were trustees." Then he says this (3): "I think I need add nothing to what has been said by the Lord Justice as regards the charges and expenses. The principle on which I decide this case is, that the trustee cannot make for himself a secret profit; and the profit is the net balance of the £85,000, after deducting any charges and expenses properly incurred in the formation of the company." He uses these words "properly incurred" because there was no contest in that case as to whether they were properly incurred or not. He defines it at the beginning as a "secret profit."

That being so, what is the amount of Mr. *Grant's* profit? If he believed that, as I am satisfied from his own statement he did believe—however he managed to convince himself of it—that he was the owner of this large sum of money, and was legally and morally entitled to retain it, how did he deal with it? He dealt with it in forming the company, and he dealt with it by paying the ordinary expenses of forming the company, and by making divers large payments which have been challenged as improperly made.

Assuming that what was alleged was all proved (though I do not say it was all proved, because a great deal of it was inference from entries in the books), the result is this: First, he paid a sum of money to the gentleman by whom the directors were introduced.

(1) 6 Ch. D. 400. (2) 6 Ch. D. 407. (3) 6 Ch. D. 408.

M. R. 1879

EMMA SILVER MINING COMPANY v. GRANT.

In the next place he furnished shares to the directors who were introduced. In the next place he paid very large sums in various ways to brokers for sustaining the market. In the next place he paid £10,000 to a firm of brokers for a share of the profits which he agreed to give them for waiving and giving up a kind of option to purchase which they possessed previously; and lastly, he paid considerable sums of money to persons connected with the press, either as writers in it or otherwise, for puffing or laudatory statements respecting the company or mine; and it is said that all those payments were immoral and improperly made, and ought to be disallowed.

Now I am not trying that question. It does not appear to me that the amount of profit can be decided by the fact of some of the payments being such payments as will not obtain for them the commendation of the Court. That is not the question. They were *bonâ fide* made by Mr. *Grant* at the time when he believed this money was his own. They were not payments for nothing. Mr. *Grant* is a man of business, and he only paid for value received. He assumed, and I daresay correctly assumed, that the services for which he paid were worth the money he paid for them; and that being so, can I say that the expenses he so incurred are not to be deducted from the amount he received in estimating his secret profit? You have a right to take from him that which he improperly acquired by means of his being concerned in this illegal transaction; and it is no answer to say that one part of his receipts were illegally obtained, and another part of his expenses were illegally and improperly made in ascertaining what that profit was. These are expenses connected with and forming part of the entire transaction; and it seems to me that in estimating his profit I ought to find out his real profit, that is, the net result of the transaction which was left to him; but whether I approve or disapprove of the mode in which he carried out the transactions, or the items of expenditure which he made, the result in ascertaining the net profit cannot be affected by the moral nature or propriety of that expenditure. I think, therefore, we ought to ascertain the net profits simply on the principle of deducting from all the receipts all the payments.

Now I come to the items. The first item is the receipt of

£100,000 in money. He must be charged with that. The second item of receipt is a sum of £45,000, or thereabouts, which was the net result of the sale of shares, and which came in lieu of the £100,000 worth of shares which he was to have by the first agreement. Of course those are sums received. Then there were two small sums which he received for sustaining the market, for the result, as appears by the books (which appear to me to be admirably kept), of sustaining the market was in this case a profit. That sum again he received for sustaining the market by dealing with those shares in the way I have mentioned. Then there is a small sum of £1500, or thereabouts, which really falls into the same category as the £45,000. It is a portion of the shares which it was said he was entitled to take and sell for his own benefit. That is the amount of profit derived by those sums. I think they are chargeable and should be charged against him.

I then deduct all sums actually paid by him, whether to brokers for getting rid of the option, or to brokers for getting rid of the shares, or for sustaining the market, or to the directors, or to the agent who procured the directors, or to the gentlemen connected with the press for the part they took in the transaction. It seems to me all those sums ought to be allowed to him. Taking the books to be correct, and they are not challenged, and I see no reason for challenging them, those sums will be deducted from the sums he is charged with. I find as a verdict that he is liable, as promoter, for the balance together with interest at 4 per cent. from the date which has been mentioned.

Order:—That this Court doth as to the first issue find that the Defendant *Albert Grant* was a promoter of the company, and as to the second issue that the Defendant *Albert Grant* received as profit under the agreements of the 2nd of November, 1871, and the 5th of December, 1871, or one of them, the sum of £108,188 6*s.* 11*d.* as a promoter of the company without the knowledge of the company, and was accountable to the company for the same, less the sum of £2250 ordered by consent to be paid by the Defendant *Maurice Grant* to the company, with interest at the rate of 4 per cent. per annum on £46,662 5*s.* 6*d.* from 31st of December, 1871, and on the balance from the 30th of June, 1872.

Solicitors for Plaintiff Company: *Snell & Greenip.*
Solicitors for Defendants: *J. J. Ridley; Lewis & Lewis.*

M. R.
1879
April 7.

HAMER *v.* GILES.

[1876 H. 140.]

GILES *v.* HAMER.

[1876 G. 69.]

Practice—Partnership Action, Costs of—Misconduct of Partner—"Partnership Assets"—Solicitor—Costs—Charging Order—Proceeding by Summons or Petition—Title of Proceeding—Garnishee Order Nisi—Service—Priority—Attorneys and Solicitors Act, 1860, *s.* 28—*Rules of Court*, 1875, *Order* XLV., *rr.* 2, 3, 6.

13 Ch D 845-6 847
14 Ch D 44

The rule as to costs in a partnership action is the same as in any other administration action, that is, they are payable out of the assets; "partnership assets" meaning the assets remaining after payment of all the partnership debts, including balances due to any of the partners. If the assets are insufficient for payment of the costs of the action, then such costs must be borne by the partners in proportion to their shares in the profits (1).

Where, however, a partnership action has been rendered necessary by the

(1) M.R. in Chambers. July 3, 1879.

AUSTIN *v.* JACKSON.

[1878 A. 35.]

13 Ch D 845-6 847.

THE Plaintiff and Defendant had been carrying on business as partners, being entitled to the profits in equal shares.

This was an action for dissolution of the partnership, for accounts, and for a receiver.

On the 10th of May, 1878, the Plaintiff moved for and obtained a receiver, and the motion was treated, by consent, as a motion for judgment. The Court thereupon declared the partnership dissolved as from the date of the order, and it was referred to a special referee to take the following accounts and to report thereon to the Court, namely, (1) An account of all partnership dealings and transactions between the Plaintiff and Defendant; (2) An account of the credits, property, and effects then belonging to the partnership. Directions were given for the sale of the partnership business as a going concern, and the further consideration was adjourned into Chambers. There was no special reservation of costs.

The referee by his report, which was confirmed by his Lordship, certified that a balance of £77 7*s.* 10*d.* was due to the partnership from the Defendant, and that a balance of £939 0*s.* 3*d.* was due from the partnership to the Plaintiff.

The business was eventually sold, and the net purchase-money paid into Court. The partnership assets, after payment of the outside debts, proved insufficient for payment of the debt due to the Plaintiff.

The case came on for hearing on further consideration in Chambers.

Cozens-Hardy, for the Plaintiff:—

The whole of the existing assets, after providing for the amount due to

M. R.

1879

HAMER v. GILES.

GILES v. HAMER.

negligence or other misconduct of a partner, the Court will order that partner to pay the costs of the action so far as they have been occasioned by his misconduct, including the costs up to the trial.

An order giving a solicitor a charge under sect. 28 of the *Attorneys and Solicitors Act*, 1860, for his costs as between solicitor and client, on property recovered by him for his client in an action, is sufficient if intituled in the action: it may be obtained either on summons or petition, and need not be intituled either in the matter of the Act or of the solicitor.

A garnishee order *nisi* does not create a charge until service of it on the garnishee.

A judgment creditor of the Defendant in a partnership action obtained a garnishee order *nisi* to attach all moneys in the hands of the receiver in the action appearing to be due to the Defendant on taking the accounts. On the following day, and before service of the order *nisi*, the Defendant's solicitors obtained, on a summons served on the receiver, a charging order intituled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the Defendant under the action. On the next day the garnishee order *nisi* was served on the receiver, and was subsequently made absolute:—

Held, that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order both under the Act and independently of it.

THESE were two partnership actions, in which a decree had been made appointing *Hamer* receiver, and declaring that the partnership formerly subsisting between himself and *Giles* had been dissolved, and directing certain accounts and inquiries.

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the receiver, belong to the Plaintiff. The Defendant must pay the balance due from him, and also the costs of the action, for he has no interest in the partnership assets.

E. A. Geare, for the Defendant:—

The Defendant is entitled to his costs out of the assets, according to the rule laid down in *Hamer* v. *Giles* (*suprà*).

JESSEL, M.R.:—

The rule in *Hamer* v. *Giles* only applies where there are actual partnership assets. The balance due to the Plaintiff must be treated like a debt due to an outside creditor. It must be paid, so far as the fund in Court together with the balance due from the Defendant does not suffice to meet it, by the Plaintiff and Defendant in equal shares. When all the debts have been thus paid, there being no joint assets out of which the costs of the action can be paid, the aggregate costs of the Plaintiff and Defendant ought to be paid equally by the Plaintiff and Defendant. As there was no reservation of costs in the original decree, the Defendant cannot be ordered to pay the costs of the action. The Defendant must pay into Court the balance due from him, and the Plaintiff will receive the residue of the fund in Court, including the Defendant's balance, after providing for the amount due to the receiver. The deficiency of this residue to meet the £939 0s. 3*d*.

M. R. 1879 — HAMER v. GILES. — GILES v. HAMER.

Subsequently the accounts and inquiries were, by consent, ordered to be referred to a special referee, who was to report thereon to the Judge.

The referee made his report, from which it appeared that certain moneys were then due from *Hamer* to *Giles*, and this report was adopted and confirmed by an order of the Court.

On the 4th of March, 1879, the Chief Clerk certified the result of the accounts and inquiries and the amount of the partnership liabilities upon the basis of the referee's report. He also certified that *Hamer* had not yet passed his accounts as receiver.

The actions now came on upon further consideration, when, in discussing the question of costs, the point arose, whether in a partnership action the Court would make any order as to costs up to the trial.

Davey, Q.C., and *Cozens-Hardy*, for *Hamer*:—

The practice in partnership actions is thus stated in *Seton* on Decrees (1): "The rule is, that the Court makes no order as to the costs up to the hearing, even though the cause of the dissolution is the negligence of a partner (*Hawkins* v. *Parsons* (2)); but that the costs after the hearing are paid out of the partnership estate." Your Lordship, however, appears to have adopted a different practice: *Norton* v. *Russell* (3).

[They also referred to *Newton* v. *Taylor* (4).]

Phipson Beale, for *Giles*.

JESSEL, M.R.:—

My opinion is that the rule is not as stated in *Seton*. It appears to me that where there is no fault on either side, but the partner-

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must be ascertained, and the Defendant must pay half of the deficiency to the Plaintiff. The total amount of the party and party costs of both parties to the action must be taxed, and the Plaintiff or Defendant, as the case may be, must pay to the Defendant or Plaintiff the difference between one moiety of the total amount of the party and party costs and his own party and party costs.

Solicitors: *Walker & Battiscombe*; *Pike & Son*.

(1) 4th Ed. p. 1206.
(2) 8 Jur. 452.
(3) Law Rep. 19 Eq. 343.
(4) Ibid. 14.

ship accounts have to be taken in this Court, the costs of the action for taking the accounts from the beginning ought to be dealt with as all other costs of necessary administration, that is, they must come out of the partnership assets. Of course, where an action for dissolution is rendered necessary by the misconduct of a partner—as, for instance, where a partner whose duty it is to keep the accounts has neglected to do so—the Court not only has jurisdiction, but is bound to exercise it, by making that partner pay so much of the costs as are occasioned by his misconduct. But in all other cases there is no difference between the costs of the action for taking the accounts prior to the trial and the subsequent costs, and I have always acted on that rule.

His Lordship then, being of opinion that the actions had not been occasioned by misconduct on either side, directed that the costs should come out of the general balance in *Hamer's* hands.

The actions then came on upon a summons by *Hamer* to take his Lordship's directions under the following circumstances:—

Giles had been settled on the list of contributories of *Hamer, Giles, & Co, Limited,* which was in course of liquidation, and on the 3rd of December, 1878, the liquidator obtained an order that *Giles* should pay a sum of £275 due from him for calls. On the same day the liquidator obtained a garnishee order *nisi* under Rules of Court, 1875, Order XLV., rule 2, requiring *Hamer* and *Giles* to shew cause why any moneys then or thereafter in the hands of *Hamer* appearing to be due to *Giles* by the referee's report, should not be attached to answer the £275, and why the garnishee, *Hamer,* should not pay that sum to the liquidator. This order was served on *Hamer* and *Giles* on the 5th of December, but on the previous day, the 4th of December, an order was obtained by *Giles'* solicitors, on a summons served on *Hamer* and intituled in the two actions, declaring that they were entitled to have a charge for their costs in the actions upon all moneys coming to *Giles* upon taking the partnership accounts, and directing such costs to be taxed.

On the 20th of December the garnishee order *nisi* was made absolute.

As it appeared that the moneys coming to *Giles* would probably

M. R. 1879 HAMER v. GILES. GILES v. HAMER.

be insufficient to satisfy both charges, the question arose whether his solicitors were entitled under their order to be paid in priority to the liquidator.

The question was raised by a summons taken out by *Hamer*, under Rules of Court, 1875, Order XLV., rule 6, to obtain his Lordship's directions as to paying the £275 to the liquidator.

Davey, Q.C., and *Cozens-Hardy*, for *Hamer*.

Phipson Beale, for *Giles'* solicitors :—

We obtained our charge under sect. 28 of the *Attorneys and Solicitors Act*, 1860; and it has been decided that the solicitor's lien under that section has priority over all charges created by the client: *Haymes* v. *Cooper* (1). Therefore our prior right cannot be displaced by the garnishee order *nisi*.

Moreover, that order, though dated before, was not served until after ours, and according to Order XLV., rule 3, the order *nisi* does not create a charge until service on the garnishee.

Chadwyck Healey, for the liquidator:—

My charge is effectual from the date of the order *nisi*: *Ex parte Joselyne* (2).

[JESSEL, M.R.:—That case has recently been considered by the Court of Appeal in *In re Stanhope Silkstone Collieries Company* (3), where it was held that a garnishee order *nisi* does not create a charge until service on the garnishee. In *Ex parte Joselyne* the decision was really to the same effect.]

I submit further that the solicitors' order was irregular. They should have proceeded by petition intituled either in the matter of the *Attorneys and Solicitors Act*, or of the solicitors.

[JESSEL, M.R. :—In *Faithfull* v. *Ewen* (4) the order seems to have been intituled in the Act as well as in the action. I see the practice is thus stated in *Seton* (5): "A petition for a declaration of charge under this section must be intituled in the suit, where the costs have been incurred in one, as well as under the Act;"

(1) 33 Beav. 431. (3) 11 Ch. D. 160.
(2) 8 Ch. D. 327. (4) 7 Ch. D. 495.
(5) 4th Ed. p. 644.

but I find nothing in the Act itself saying that the order must be intituled in anything but the action.]

I submit that, as the Act is one which gives a special remedy to solicitors, any order under it ought to be intituled in it, according to the practice in proceedings under any other Act giving a special remedy.

JESSEL, M.R.:—

I am quite clear about the priority; but the only question is on what ground to put it: there are so many. In the first place a solicitor always had a lien on property recovered, quite independent of the Act, and that lien could always have been enforced by an order in the suit. Therefore, treating this as a mere order in the actions, it would have been a very good charge. It was a declaration of the solicitors' previous lien, which they had by law, and a direction for taxation. That would make the order good independently of any question of title, and it was made on service and before the liquidator's order *nisi* was served; for the solicitors' order was made on the 4th of December, the liquidators order *nisi* not being served till the 5th.

But, besides that, I am of opinion that by no possible process could *Giles* give a third person a prior charge to his solicitor. The interest of *Giles* was equitable, whatever it was; and the right of the solicitor was in equity prior to that of *Giles*, and consequently *Giles* could not have given a prior right in equity to an equitable *chose in action* to the liquidator. But those considerations are quite independent of the Act of Parliament.

Now I come to the Act of Parliament, and I must say, I can see nothing in the Act of Parliament which says that the order must necessarily be intituled in anything more than the action. It must be in the action, because it is "in every case" in which the solicitor "shall be employed to prosecute or defend any suit, matter, or proceeding," and it is to be made by the Judge "before whom any such suit, matter, or proceeding has been heard." Therefore it must be intituled in the action; but I do not find anything in the Act which compels it to be intituled in anything else; so, in my opinion, that title is sufficient.

M. R.
1879
HAMER
v.
GILES.
GILES
v.
HAMER.

In the next place, I do not see anything in the Act to require a petition. It may be done by summons; and certainly, if done by summons, the order, not having been reversed, is a very good order. The order is not void even if the Act requires a petition. Therefore there seems to be nothing in that objection.

I direct the solicitor to be paid first.

There will be one order on the further consideration and summons to the following effect: first pay out of the fund in *Hamer's* hands the party and party costs of *Hamer's* and *Giles'* solicitors; then divide the residue in the proportions due to *Hamer* and *Giles;* then, out of the fund coming to *Giles,* pay, first, the costs which *Giles* has been ordered to pay by former orders in the actions, and also *Hamer's* costs of the summons; secondly, pay to *Giles'* solicitors the difference between their party and party costs and solicitor and client costs; and, thirdly, pay the amount due to the liquidator and his costs.

Solicitors: *Sharpe, Parkers, & Co,* agents for *Green & Dixon, Northwich; Sharp & Ullithorne,* agents for *Simpson & Hockin, Manchester.*

CHAMPNEY *v.* DAVY.

V.-C. H.

[1874 C. 287.]

1879

Feb. 4, 5.

Will — Charitable Legacy — Pure and Impure Personalty — Mortmain Act (43 *Geo.* 3, *c.* 108)*—Particular Residue—General Residue—Lapse or Invalidity.*

A testatrix bequeathed certain specific portions of her personal estate to trustees upon trust for sale and conversion, payment of debts and legacies, investment and payment of the income to her mother for life, and, after her death, as to £2000, part of the fund, to pay the same to the vicar of *M.* to be disposed of at his discretion "in or about restoring, altering, and enlarging and improving the church, parsonage-house, and school" of *M.*; "and as to the residue thereof," upon the trusts thereinafter declared concerning the moneys to arise from the sale of her real estate. The testatrix then gave "all the rest, residue, and remainder of her personal estate" to her mother absolutely, and devised her real estate to the same trustees in trust for sale, and directed them to hold the sale moneys and the residue of the said trust moneys, stocks, funds, shares, and securities in trust for the children of *C.* absolutely.

Part of the property comprised in the bequest to the trustees consisted of impure personalty:—

Held, first, that, the church being situate on land already in mortmain, there must be an inquiry to ascertain whether the parsonage-house and school, or which of them were or was also so situate, and what sums of money would be required to be laid out in restoring, altering, and enlarging and improving such of the said three objects of the legacy as were or was so situate, and that the legacy was valid, so far as the objects were concerned, to the extent of the money so ascertained to be required:

Secondly, that (following *Sinnett* v. *Herbert* (1)) the amount of the legacy required for the objects already in mortmain must be apportioned between the pure and impure personalty, and be paid out of the pure personalty to the extent of its proportion, and, under 43 Geo. 3, c. 108, out of the impure personalty to the full extent of £500:

Held, also, that so much of the £2000 as failed passed to the legatees of the particular residue of the fund out of which it was given, and not under the general gift of residuary personal estate.

The construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift, nor is there any sound distinction between lapsed and invalid dispositions, whether under a power of appointment or in exercise of ownership.

FURTHER CONSIDERATION of an administration suit.

The testatrix in this suit, who died in 1874, by her will dated

(1) Law Rep. 7 Ch. 232.

V.-C. H. 1879 CHAMPNEY v. DAVY.

in 1872, after giving certain pecuniary legacies, bequeathed to trustees, their executors, administrators, and assigns, "all her moneys, securities for money, money secured on mortgages, railway stocks and shares, moneys to be produced from the sale of any property at *Scarborough* or *Peterborough* to which she was entitled, all moneys to which she was or might be entitled under the will of her late grandfather *Thomas Phillips*, and also all her moneys invested upon any securities in any way or manner howsoever," upon trusts for sale and conversion into money; and out of the moneys arising therefrom to pay her debts, funeral and testamentary expenses, and the legacies given by her will; and directed the trustees to stand possessed of the residue thereof upon trust to invest the same upon certain stocks, funds, or securities therein mentioned, and to stand possessed of the said trust moneys, stocks, funds, and securities, and the income thereof, upon trust to pay the income to her mother *Hannah West* (since deceased) during her life, and after her mother's decease, upon trust to stand possessed of the said trust moneys, stocks, funds, and securities, and the interest, dividends, and annual produce thereof, upon trust as to £2000, part thereof, to pay the same to the vicar for the time being of *Muston*, to be by him applied and disposed of in such manner as he in his absolute discretion should think proper in or about restoring, altering, and enlarging and improving the church, parsonage-house, and school attached thereto, whose receipt for the said sum of £2000 should be a sufficient discharge to her said executors; and as to the residue thereof, upon the trusts thereinafter expressed and declared of and concerning the moneys to arise and be produced from the sale of her real estate as thereinafter mentioned. And the said testatrix gave and bequeathed unto her said mother all the rest, residue, and remainder of her personal estate and effects, whatsoever and wheresoever, for her own absolute use and benefit. And the testatrix thereby devised all her real estate to the same trustees, their heirs and assigns, on trust for sale, and declared that her trustees should stand possessed of the money to arise from the sale of her real estates, "and the residue of the said trust moneys, stocks, funds, and securities," and the rents, interest, and annual produce thereof, in trust for all and every the children of *Elizabeth Curtis Davy*, in equal shares absolutely. The testatrix

thereby also declared that all income directed to be paid to her mother should be paid for her separate use, and that any disposition by way of anticipation of such income should be void, and that immediately thereupon such income should become forfeited.

Part of the property comprised in the bequest to the trustees consisted of impure personalty, and in particular the property at *Scarborough* and *Peterborough* was of leasehold tenure, and the mother of the testatrix having died, three questions were now argued. First, to what extent the legacy of £2000 to the vicar of *Muston* failed under the general provisions of the Mortmain Acts as being a bequest of money to be laid out on land not already in mortmain. Secondly, to what extent the same legacy was payable out of the impure personalty under the statute 43 Geo. 3, c. 108 (1): and, thirdly, whether the residue of the fund out of which the £2000 legacy was given passed as particular residue upon the trusts declared of the sale moneys of the real estate in favour of the children of *Elizabeth Curtis Davy*, or was included in the general residuary gift of personal estate to the mother of the testatrix.

The two questions arising as to the legacy of £2000 were argued first.

Hastings, Q.C., and *Nalder*, for the trustees of the will.

Robinson, Q.C., and *Sutton*, for the Vicar of *Muston*:—

The objects for which this legacy of £2000 is given being within the statute 43 Geo. 3, c. 108, the legacy must be apportioned between the pure and the impure personal estate com-

(1) The statute 43 Geo. 3, c. 108, enacts (sect. 1) that every person having in his own right any estate or interest in any lands or tenements, or any property in any goods or chattels, shall have power by deed inrolled or by will, such deed or will being duly executed three calendar months at least before the death of the grantor or testator, to give to and vest in any person or body politick or corporate, and their heirs and successors, all his estate or property in such lands or tenements not exceeding five acres, or goods or chattels not exceeding in value £500, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said United Church are or shall be used or observed, or any mansion-house for the residence of any minister of the said United Church officiating or to officiate in any such church or chapel, or any outbuildings, offices, churchyard, or glebe for the same respectively.

V.-C. H. 1879 CHAMPNEY v. DAVY.

prised in the bequest of the property out of which it is payable; and after the amount apportioned in respect of the pure personalty has been satisfied thereout, the legatee will be entitled under the statute to have the legacy further satisfied to the full extent of £500 out of the impure personalty comprised in the bequest: *Sinnett* v. *Herbert* (1).

W. Pearson, Q.C., and *Speed*, for the Defendants, the children of *Elizabeth Curtis Davy*:—

The legacy of £2000 is altogether void, for it might be applied for objects rendered illegal by the *Statute of Mortmain*: *Pratt* v. *Harvey* (2); *In re Watmough's Trusts* (3).

It is given for four purposes applicable to three objects, *i.e.*, for "restoring, altering and enlarging and improving the church, parsonage-house, and school." All those purposes, and also all those objects, are coupled together, and it is impossible to separate or split them up, or to say how much should be apportioned to any one particular purpose or object. The "enlarging" contemplates expressly the bringing of land into mortmain, and renders the whole gift void. The parsonage-house and school, or one of them, may not be on land already in mortmain, so that the legacy may at all events be void as to part, and as it cannot be ascertained as to what part, it must altogether fail: *Hoare* v. *Osborne* (4); *In re Rigley's Trust* (5).

Again, the legacy is not within the statute 43 Geo. 3, c. 108, first, because the proceeds of the sale of lands of any tenure are not within the scope of that Act, and secondly, because "enlarging" is not one of the purposes, nor is a "school" one of the objects for which it permits lands or money to be given: *Sinnett* v. *Herbert* is not applicable to the present case. There the gift was in the alternative, for "erecting or endowing." And one purpose, the erecting, being authorized by the statute of Geo. 3, and separable from the other purpose "endowing," which was not so authorized, the whole gift was applicable to the alternative legal purpose, and was good. But that is not so here. This case

(1) Law Rep. 7 Ch. 232.
(2) Ibid. 12 Eq. 544.
(3) Law Rep. 8 Eq. 272.
(4) Ibid. 1 Eq. 585.
(5) 36 L. J. (Ch.) 147.

is more like the *Incorporated Church Building Society* v. *Coles* (1), and the legacy is bad altogether.

Dickinson, Q.C., and *Ingle Joyce*, for the executor of *Hannah West*, the mother of the testatrix :—

We adopt the same arguments. The legacy must, under any circumstances, be cut down to £500; and if it is so cut down, what is the legatee to do with it? He cannot apply any part of it towards the school, for that is not one of the objects rendered legal by the Act of Geo. 3, whilst if he does not so apply it, he will not be acting in accordance with the will; and the result is that there is a gift applicable for purposes contrary to the *Statute of Mortmain*, and the legacy fails.

Robinson, in reply :—

If the church, parsonage-house, and school are situated on land already in mortmain, all the objects and purposes of this gift are legal, and *Sinnett* v. *Herbert* (2) shews that so far as the objects are legal the Court will carry them out. The *Incorporated Church Society* v. *Coles* only decides that a testator does not bring himself within the Act by devising land in trust for sale. [He distinguished the other cases cited on the other side, and referred to *Theobald* on Wills (3), and the cases there cited.]

HALL, V.C.:—

I have now to dispose of the questions which have been discussed as to the validity of this legacy of £2000, and I shall first deal with the distinction between the pure and impure personal estate with reference to this disposition. As regards the pure personal estate there is no possible objection to this legacy so far as there is pure personal estate to answer the gift; except in so far as that pure personal estate has been directed, if at all, to be laid out for purposes which are prohibited by the *Statute of Mortmain*. Now, the fund is to be applied "in or about restoring, altering, and enlarging and improving the church, parsonage-house, and school attached thereto;" and it may be that the

(1) 1 K. & J. 145, 155; 5 D. M. & G. 324.

(2) Law Rep. 7 Ch. 232.

(3) Page 196.

V.-C. H. 1879 CHAMPNEY v DAVY.

parsonage-house and school are not in mortmain, in which case this would practically be a legacy of money to be applied in or towards acquiring or purchasing land not already in mortmain. As to that, therefore, if it be desired, I must direct an inquiry to ascertain whether the site of the parsonage-house and the school are in mortmain, and to the extent to which such sites are not in mortmain the gift must fail. Subject to that, it appears to me that the gift is perfectly good. I say to that extent, and it is an observation which applies both to pure and impure personal estate. I do not think that the circumstance of there being three subject-matters upon which the money might be laid out gives rise to any real difficulty. No doubt there was an observation of Vice-Chancellor *Wood* in *Sinnett* v. *Herbert* (1), and there are observations in other authorities, that where there are several objects of a charity, one of which is illegal, the whole gift must fail, there being no means of determining the amount to be devoted to each object. But I do not take that to be the law in a case where you can ascertain how much ought to go to each object. In fact, in *Hoare* v. *Osborne* (2), and *In re Rigley's Trusts* (3), it was only because the Vice-Chancellor *Kindersley* considered that from the nature of the subject-matter it could not be ascertained what amount ought to be set apart for each object, that he adopted the rule, not of the invalidity of the entire gift, but of the division of the fund according to the number of the objects specified.

The same question came under the consideration of Vice-Chancellor *Wood* in *Fisk* v. *Attorney-General* (4). In that case there was a gift by will of £1000 consols to the rector and churchwardens of a parish and their successors upon trust to apply such dividends thereof as should from time to time be necessary or required, in keeping in repair a family grave, and to pay and divide the residue of the said dividends, at Christmas every year for ever, amongst the aged poor of the parish; and it was held, that though the amount of the gift for the repair of the grave was not specified, the Court could, if necessary, have estimated the amount "necessary and required" for the purpose, and so have prevented the gift of the residue from being void for uncertainty.

(1) Law Rep. 7 Ch. 232.
(2) Ibid. 1 Eq. 585.
(3) 36 L. J. (Ch.) 147.
(4) Law Rep. 4 Eq. 521.

The Vice-Chancellor came to that conclusion after observing upon the case of *Chapman* v. *Brown* (1), which has always been considered as being a case looking the other way.

Therefore, I hold that for the purpose of ascertaining the quantum and validity of this legacy, supposing it should turn out that the parsonage-house or school are not on land already in mortmain, there must be an inquiry to ascertain whether the church, parsonage-house, and school of *Muston*, or which of them were or was situated upon lands already in mortmain, and what sums of money will be required to be laid out in restoring, altering, and enlarging and improving such of them as are already in mortmain; and the gift will prevail to the extent to which it may be ascertained that the money will be required for the objects already in mortmain, and it will fail as to the rest.

Then as to the extent to which the legacy is to come out of the impure personal estate, it appears to me that, having regard to the 1st and 2nd sections of the statute of 43 Geo. 3, c. 108, I must give effect to the gift to the extent to which the law will allow it to take effect out of the impure personal estate. In that respect I follow *Sinnett* v. *Herbert* (2); and the result is that the amount of the legacy required for the objects already in mortmain must be apportioned as between the pure and impure personalty comprised in the bequest, and must be paid out of the pure personalty to the extent of its proportion, and out of the impure personalty to the full extent of £500.

The third question was then argued, viz., whether the part of the £2000 legacy which failed passed under the gift of the residue of the particular fund out of which that legacy was given, or under the general gift of residuary personal estate to the mother of the testatrix.

W. Pearson, Q.C., and *Speed*, for the Defendants, the children of *Elizabeth Curtis Davy*, in trust for whom the particular residue was given:—

The manifest intention of the testatrix was by this bequest to dispose of everything comprised therein in favour of these Defen-

(1) 6 Ves. 404. (2) Law Rep. 7 Ch. 232.

V.-C. H. 1879 CHAMPNEY v. DAVY.

dants, subject only to the payment of the debts and legacies payable thereout and of the £2000 legacy; and everything comprised in the bequest and not effectually disposed of passes to the Defendants under the gift of the particular residue: *Carter* v. *Taggart* (1); *De Trafford* v. *Tempest* (2); *In re Harries' Trusts* (3). There is no intention whatever that the general residuary legatee should take absolutely any part of the particular fund. On the contrary, she is herself the tenant for life of that very fund.

[They also referred to *Theobald* on Wills (4).]

Dickinson, Q.C., and *Ingle Joyce*, for the executor of the mother of the testatrix:—

The question in all these cases is whether the legacy which has failed was given by way of a charge upon the particular fund or by way of an exception of an aliquot part out of it. In the first case the legatee of the particular residue satisfies it; in the second case he does not, and it lapses to the legatee of the general residue; for the particular legatee has no right to anything that is not actually given to him; and where, as here, the legacy is illegal, the construction in favour of its passing under the gift of general residue applies with greater force: *In re Jeaffreson's Trusts* (5); *Easum* v. *Appleford* (6); *Oke* v. *Heath* (7); *Falkner* v. *Butler* (8); *Bernard* v. *Minshull* (9); *Skrymsher* v. *Northcote* (10); *Lloyd* v. *Lloyd* (11). The contention of the other side is that although the testatrix has given the £2000 to the vicar of *Muston*, she intended so much of it as failed to go to the particular legatee away from whose fund this aliquot part was taken, and to whom it was never given. This cannot be the intention, and the general legatee is entitled.

W. Pearson, in reply:—

The cases cited are all cases of a gift of a specific portion of a fund to *A.*, and of the ascertainable residue to *B.*; but here the

(1) 16 Sim. 423.
(2) 21 Beav. 564.
(3) Joh. 199.
(4) Pages 93, 94.
(5) Law Rep. 2 Eq. 276, 283.
(6) 5 My. & Cr. 56.
(7) 1 Ves. Sen. 135.
(8) Amb. 514.
(9) Joh. 276.
(10) 1 Sw. 566.
(11) 4 Beav. 231.

debts and funeral expenses are to be paid out of the bequeathed property as well as the legacy of £2000, so that there are charges of uncertain amount, a circumstance which is strongly in favour of the particular legatee. Moreover, as the life interest is subject to forfeiture, the mother of the testatrix had, according to the contention of the other side, only to forfeit the income and she would immediately come into the capital of the legacy.

[He referred to *Wollaston* v. *King* (1).]

HALL, V.C. :—

I will dispose of this question to-morrow.

Feb. 5. HALL, V.C. :—

In *Falkner* v. *Butler* (2), under a limited power of appointment, the donee appointed a sum to persons not objects of the power, and this sum was held to pass under the appointment of the residue, *i.e.*, it fell into the residue. So in *Wollaston* v. *King* it was held, there being an invalid appointment of part of a trust fund, that that part of the fund passed under an appointment "subject to the appointment thereinbefore contained of all the trust moneys subject to the trusts of the settlement." In *Carter* v. *Taggart* (3), the testatrix, exercising a power over a specified sum, gave part of it to a person who died before her, and gave all the rest and residue of the sum "after deducting therefrom the legacies above mentioned." The part which lapsed was held to fall into the residue. This decision, I think, turned upon the particular will, indicating (particularly by a life estate being given in part with a direction that that part should fall into the residue) an intention that all should pass, subject only to the charge. In *De Trafford* v. *Tempest* (4) a lapsed gift of particular furniture was held to fall into a gift of furniture not thereinbefore otherwise disposed of, and not to pass under a general residuary gift. In *Easum* v. *Appleford* (5), which was a case of an appointment under a power, Lord *Cottenham* considered that the fund was a definite

(1) Law Rep. 8 Eq. 165.
(2) Amb. 514.
(3) 16 Sim. 423.
(4) 21 Beav. 564.
(5) 5 My. & Cr. 56.

V.-C. H. 1879 CHAMPNEY v. DAVY.

one, that the last disposition, though of "residue," was in substance to be read as if the amount had been inserted in the disposition. In *In re Harries' Trusts* (1), Vice-Chancellor *Wood* held, upon the whole instrument, that a lapsed share of a definite sum passed under an appointment of the residue of the moneys after deducting certain specified sums. He considered *Carter* v. *Taggart* (2) and *Falkner* v. *Butler* (3) to apply, rather than *Easum* v. *Appleford* (4). In *In re Jeaffreson's Trusts* (5), which was a case of the execution of a power, the donee appointed £100, part of the fund, to a person not an object of the power, and appointed the balance of the fund, after payment of certain other sums well appointed, which sums he described as £260, to pay her own debts (which was an invalid direction), and "should any surplus remain" he gave it to an object of the power. Here there were two invalid gifts; the latter was held to fall into the ultimate surplus, the former was held to pass as unappointed. That decision as regards the £100 followed *Easum* v. *Appleford*, the £100 not becoming part of and passing with the balance, because that was defined as £260. That case, therefore, is not an authority in favour of the general residuary legatee in the present case; and, construing the whole will, and having regard to the authorities, I hold that the particular residuary legatees are entitled to so much of the £2000 legacy as is not well disposed of.

I do not think there is any sound distinction between cases of lapsed and cases of invalid disposition, whether the disposition be under a power of appointment, special or general, or in exercise of ownership; nor do I think that the construction of a particular residuary gift is affected by the presence or absence of a general residuary gift.

Solicitors: *Collyer-Bristow, Withers, & Russell; Richard Smith & Wilmer*, agents for *Ford & Warren, Leeds; J. & F. Needham.*

(1) Joh. 199.
(2) 16 Sim. 423.
(3) Amb. 514.
(4) 5 My. & Cr. 56.
(5) Law Rep. 2 Eq. 276.

HODGSON *v.* HALFORD.

V.-C. H.
1879
March 19.

[1878 H. 143.]

Power of Appointment—Exclusive—Exercise of—Forfeiture Clause—Change of Religion by Appointee—Cesser of Life Interest—Remoteness—Public Policy.

A testatrix, by will, dated in 1845, limited to a daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, and declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish and adopt the Christian or any other religion, then such son or daughter should forfeit all share in the fund, and in case of forfeiture the forfeited share was to accrue and go over to the other or others of the children living at the time of the forfeiture.

Julius, a son of the appointor, married a Christian in his mother's lifetime, but without her consent. The Plaintiff, one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death.

Both *Julius* and the Plaintiff were born after the death of the creator of the power:—

Held, first, that the forfeiture clause was not void as against public policy:

Secondly, that it was effectual as to the shares of children marrying Christians or becoming Christians during the lifetime of the appointor, and therefore that the share of *Julius* was forfeited:

Thirdly, that the forfeiture clause must be read in conjunction with the gift over, and therefore that, so far as it affected, after the death of the appointor, the share of a child born after the death of the creator of the power, it was void for remoteness, whether such share was appointed for life only or absolutely, and consequently that the Plaintiff had not forfeited her share.

MRS. *ROSY LYON*, widow, who died in 1845, by her will, dated in the same year, gave all her residuary real and personal estate to trustees, and directed them to stand possessed of certain portions of it upon trust to pay the annual produce thereof to her daughter *Esther Jacobs* for life, and after her death "upon trust for all or any in exclusion of the other or others of them of the children or child of the said *Esther Jacobs* by her husband *Bethel Jacobs* as the said *Esther Jacobs* might, notwithstanding coverture, by her last will and testament give, direct, or appoint."

V.-C. H. 1879 HODGSON v. HALFORD.

Esther Jacobs, by her will, dated in 1874, in exercise of the power of appointment so given to her, appointed that the trustees of the will of *Rosy Lyon* should stand possessed of the trust funds subject to the power upon trust to appropriate or raise thereout and invest for the benefit of each of her daughters *Rosa* and *Laura* the sum of £2750; and should stand possessed of one of such sums of £2750 and the investments thereof, upon trust to pay the income thereof to *Rosa* during her life for her separate use without power of anticipation; and of the other of such sums and the investments thereof upon trust to pay the income thereof to *Laura* during her life for her separate use without power of anticipation; and, from and after the decease of either of her said two daughters, should stand possessed of both the said sums and the investments thereof upon trust to pay the income thereof to the survivor of them during her life for her separate use without power of anticipation; and from and after the decease of such survivor in trust for such of her (the appointor's) sons *Joseph*, *Henry*, *Charles*, *Benjamin*, and *Julius*, and for such of her daughters *Maria*, *Henrietta*, and *Frances* as should be living at the time of the decease of the survivor of her said daughters *Rosa* and *Laura*, and if more than one, in equal shares absolutely.

And the testatrix *Esther Jacobs* directed that from and after her decease the said trustees should stand possessed of the residue of the trust funds subject to the power of appointment in trust for such of her sons *Joseph*, *Henry*, *Charles*, *Benjamin*, and *Julius*, and such of her daughters *Maria*, *Henrietta*, and *Frances*, as should be living at her decease, and if more than one, in equal shares absolutely. And the will of the testatrix *Esther Jacobs* contained a clause of forfeiture and a proviso with reference thereto in the following terms:—

"And I hereby direct and declare that if either during my lifetime or after my decease any son or daughter of mine shall marry a person who does not profess the Jewish religion, or shall marry a person not born a Jew or Jewess although converted to Judaism and professing the Jewish religion, or shall forsake the Jewish religion and adopt the Christian or any other religion, then and in every such case and as from the occurrence of such event such son or daughter respectively shall absolutely forfeit and lose all

share and participation in and right or power over the principal and income of all and every the trust premises, whether appointed under the powers in that behalf contained in the will of the said *Rosy Lyon* deceased, or forming part of the property bequeathed to me by my husband or otherwise as aforesaid; and as to any son of mine or any daughter of mine incurring such forfeiture, his or her share or shares, as well original as accruing by virtue of this provision, and as to the said *Rosa Jacobs* and *Laura Jacobs*, if either of them shall incur such forfeiture, the said two several sums of £2750 hereinbefore directed to be raised for their benefits respectively, and the investments representing the same, and the interest, dividends, and annual produce thereof, shall (notwithstanding anything hereinbefore contained), as from the occurrence of the event occasioning such forfeiture, accrue and go over to the others or other of them my said sons and daughters hereinbefore named who shall be living at the time of such forfeiture, and if more than one, in equal shares, their respective executors, administrators, and assigns, absolutely."

By a codicil to her will dated the 12th of July, 1876, *Esther Jacobs* recited that she had recently discovered that her son *Henry* had married according to the rites of the Church of *England*, and that her son *Charles* had recently forsaken the Jewish and adopted the Christian religion, and had married a Christian, and that both her said sons, by virtue of the provisions in her will contained, had thus absolutely forfeited all share and participation in the property therein referred to, and their respective shares had accrued and gone over to the other sons and daughters in her said will named, in equal shares; and in order the better to carry such forfeiture and accruer into effect, and by way of comfirming the same, the testatrix *Esther Jacobs* thereby revoked all the trusts, appointments, and bequests in favour of *Henry* and *Charles*, and declared that the shares to which they would but for their conduct have been entitled under her will (whether appointed or otherwise) should accrue, go over to, and be divided amongst her sons *Joseph*, *Benjamin*, and *Julius*, and her daughters *Maria*, *Henrietta*, *Frances*, *Rosa*, and *Laura*, in equal shares.

Esther Jacobs died on the 19th of September, 1876. Her son *Julius*, during her lifetime but without her knowledge, married a

V.-C. H. 1879 HODGSON v. HALFORD.

Christian; and shortly after her death her daughter *Laura*, who was the Plaintiff in this action, forsook the Jewish and adopted the Christian religion, afterwards marrying Mr. *Hodgson*, who was a member of the Church of *England*.

Both *Julius* and the Plaintiff were born after the death of *Rosy Lyon*; and they, with *Henry* and *Charles*, were the only children of *Esther Jacobs* who had either married persons who did not profess the Jewish religion or had forsaken the Jewish and adopted another religion.

Laura Hodgson now brought her action against the executors of the will of *Esther Jacobs*, who were also the trustees of the will of *Rosy Lyon*, and against the other beneficiaries under *Esther Jacobs*' will, and claimed to have the rights of parties under both wills ascertained and declared, and the trusts thereof carried into effect under the order of the Court.

The questions argued arose with reference to the shares of the Plaintiff and *Julius Jacobs*, and were, whether the forfeiture clause was, as to both or either of them, void either for remoteness or as being contrary to public policy; and by the direction of the Vice-Chancellor the question of remoteness was argued first.

Dickinson, Q.C., and *Bradford*, for the Plaintiff:—

As the Plaintiff was not born until after the death of the creator of the power, the forfeiture of her share might take effect at a period remoter than a life in being at that death and twenty-one years afterwards. With respect to the Plaintiff, therefore, the forfeiture clause violates the rule against perpetuities, and does not cut down the life interest which is well given to the Plaintiff: *Lewis* on Perpetuities (1).

In *Fry* v. *Capper* (2) it was held that though an appointor might limit a fund for life to a daughter who was unborn at the creation of the power, inasmuch as she, with those entitled to the fund subject to the life interest, might at any time dispose of it, he could not leave it to her for life without power of anticipation, without infringing the rule against perpetuities, for he would thereby restrict her, probably during her whole life, from disposing of the fund, and accordingly, while the appointment was sustained,

(1) Ed. 1843, p. 173. (2) Kay, 163.

the restraint on anticipation was rejected. Upon this authority the restriction on anticipation attached to the life interest of the Plaintiff is an infringement of the rule, and the principle applies by analogy to the forfeiture clause.

W. Pearson, Q.C., and *Chadwyck Healey*, for the Defendant *Julius Jacobs*:—

The fact that *Julius Jacobs* became a Christian during the life of his mother, the donee of the power, makes no difference, and all the arguments on behalf of the Plaintiff (of which we avail ourselves) apply to his case.

Hastings, Q.C., and *Byrne*, for the appointor's sons and daughters, *Joseph*, *Benjamin*, *Maria*, *Henrietta*, and *Frances*:—

First, with regard to the share of the Plaintiff. Her interest has been forfeited under the clause, for the limitation to her gives her a less interest than a life interest, *i.e.*, a life interest determinable upon an event in her lifetime; and it being clear that an entire life interest may be limited to an unborn person without offending the rule against perpetuities, *à fortiori* an interest determinable before death may be so limited. The rule against perpetuities is in fact laid down with reference to the commencement and not to the termination of limitations; and there is no distinction in principle between a limitation and a clause for cesser. The gift over is no doubt void for remoteness, but a clause for cesser such as this is good without any gift over: *Lewis* on Perpetuities (1); *Joel* v. *Mills* (2); *Boughton* v. *James* (3); *Jee* v. *Audley* (4); *Hampton* v. *Holman* (5), overruling *Hayes* v. *Hayes* (6).

[HALL, V.C.:—When you find a forfeiture clause associated with a gift over, is it not reasonable to read them together?]

Secondly, as to the share of *Julius*. His share is clearly forfeited. Under this clause the forfeiture may take effect in the alternative either during the lifetime of the appointor or after her death, and as *Julius* embraced the Christian faith in his mother's lifetime, the forfeiture was not too remote, and the clause operated: *Allen*

(1) Page 173.
(2) 3 K. & J. 458.
(3) 1 Coll. 26; 1 H. L. C. 406.
(4) 1 Cox, 324.
(5) 5 Ch. D. 183.
(6) 4 Russ. 311.

V.-C. H. 1879 HODGSON v. HALFORD.

v. *Jackson* (1). These alternatives must in fact be read as if they were successive limitations taking effect on the two events in question.

[HALL, V.C., referred to *Monypenny* v. *Dering* (2); *Doe* v. *Challis* (3).]

Schloss, for *Rosa Jane Jacobs*, adopted the same arguments, and referred to the following additional authorities: *Lewis* on Perpetuities (4); *Jarman* on Wills (5); *Gooding* v. *Read* (6); *Doe* d. *Blomfield* v. *Eyre* (7); *Robinson* v. *Wood* (8); *Crompe* v. *Barrow* (9); *Hewitt* v. *Lord Dacre* (10).

Robinson, Q.C., and *Solomon*, for the trustees of the will of the appointor.

Dickinson, in reply.

HALL, V.C.:—

It appears to me that this clause of forfeiture is one single clause applicable to a number of things, not merely to life interests, but also to the capital of the various shares appointed. I do not know why I should split up the clause into two parts, and I cannot in fact so split it up for the purpose of creating a forfeiture, nor can I construe the clause of forfeiture separately from the gift over. I must take the clause as I find it. I do not, therefore, desire any further argument as to the Plaintiff's share, but it is worthy of consideration whether, as regards the share of *Julius*, the forfeiture clause must not be read alternatively.

Chadwyck Healey (*W. Pearson*, Q.C., with him):—

The clause cannot be read alternatively. The appointment is by will, which takes effect from the death of the appointor, and the words "either during my lifetime" are not applicable. The

(1) 1 Ch. D. 399, 404.
(2) 2 D. M. & G. 145.
(3) 18 Q. B. 231; 7 H. L. C. 531.
(4) Page 501; supplt. 164.
(5) Vol. i. p. 261.
(6) 4 D. M. & G. 510.
(7) 5 C. B. 713.
(8) 4 Jur. (N.S.) 625.
(9) 4 Ves. 681.
(10) 2 Keen, 622.

condition contemplates operation on a vested interest, and that these children have already got something which they could forfeit and lose.

HALL, V.C.:—

I am of opinion that the forfeiture clause was effectual as to the share of *Julius*. In the cases of *Monypenny* v. *Dering* (1) and *Doe* v. *Challis* (2), to which I referred during the course of the arguments, there is an intelligible principle which seems to me to be applicable to the present case.

The question whether or not the forfeiture clause was void as being contrary to public policy, was then argued.

Chadwyck Healey (*W. Pearson*, Q.C., with him):—

The condition which the testatrix has sought to impose by this forfeiture clause is bad in itself, and void as against public policy. It is a condition which the power did not authorize. The exercise of the power must be for the benefit of the objects of the power, and not for the purpose of working out some private purpose of the donee of the power. This was held with regard to a condition restricting the residence of an object of the power in *D'Abbacthie* v. *Bizoin* (3). In *Egerton* v. *Earl Brownlow* (4), the Lord Chief Baron said that the donee of a power could not "make his political principles run with the land;" again, conditions which lead to the omission of duties, and tend to prevent those upon whom they are sought to be imposed from being good citizens, are void; and these principles apply with far greater force to a case in which the donee of a power seeks in exercising it to impose a fetter upon the conscience of the objects of the power, and to bribe them into any particular religious opinions: *Sheppard's* Touchstone (5); *Hunter's* Digest of Roman Law (6); *Mitchell* v. *Reynolds* (7); *Wren* v. *Bradley* (8); *Wilkinson* v. *Wilkinson* (9);

(1) 2 D. M. & G. 145. 17 Jur. 467
(2) 18 Q. B. 231; 7 H. L. C. 531.
(3) Ir. Rep. 5 Eq. 205.
(4) 4 H. L. C. 1. 16 Jur. 71
(5) 7 Ed. vol. i. pp. 117, 132.
(6) Page 765; citing Ulpian, Dig. book xxviii. tit. 7, chap. viii., Preface.
(7) 1 P. Wms. 181.
(8) 2 De G. & Sm. 49.
(9) Law Rep. 12 Eq. 604.

V.-C. H. 1879 HODGSON v. HALFORD.

Traiton v. *Traiton* (1). Moreover, this condition is bad by analogy to marriage brocage contracts: *Tennant* v. *Braie* (2).

HALL, V.C.:—

I think that every argument that could be urged has been addressed to me in favour of the contentions that this appointment is either unauthorized by the terms of the power itself, or is one which the Court ought not to give effect to upon grounds of public policy, or other similar grounds. First, as regards the contention that the appointment is not authorized by the terms of the power. In the absence of any authority to the contrary, I think that a power such as this given to a parent to appoint amongst his children ought not to receive a limited or narrow construction, but ought rather to be construed so as to embrace every ordinary provision which a parent might make, and which might be useful or available for the children amongst whom and in whose favour the power is to be exercised. The power is not a mere power of selecting individuals to take, but a power to appoint amongst all or any one or more of the children.

It is said that this clause of forfeiture is void as being against public policy, and several authorities have been cited in support of that contention. All those authorities, however, were, as it appears to me, cases in which the condition was unquestionably against public morality, and it was on that ground that the Court declined to give effect to it. Those cases, therefore, do not establish that for which they were cited. The case which comes nearer to the present than any which was cited to me is *In re Dickson's Trusts* (3). There a daughter of the testator was a legatee under his will, and by a codicil the testator provided that that daughter should be excluded from participation under the will if she became a nun, and Vice-Chancellor Lord *Cranworth* held that to be a perfectly good provision. Still that was throwing out a great temptation, as has been suggested, to the lady not to become a nun; it was a sort of bribe to her not to act according to her conscience—an inducement to her not to profess that which in conscience it may be she ought to have professed. I cannot in

(1) 1 Vern. 413. (2) Tothill, 141.
(3) 1 Sim. (N.S.) 37.

the absence of authority say that a parent or appointor (and for this purpose I see no difference between them) disposing by will either of his own property or of any property over which he has a power of appointment, is not perfectly justified in making a provision in favour of such of his children as shall not embrace a particular faith—Christian, Roman Catholic, Mahommedan, or any other. Therefore the ground on which it is attempted to get rid of the effect of this condition fails.

Solicitors for Plaintiff: *Lindo & Co.*
Solicitor for Defendant *Julius O. Jacobs: Walter Webb.*
Solicitors for other Defendants: *Lindo & Co.*

FRY, J.
1879
May 3, 10.

BOLTON *v.* BOLTON.

[1878 B. 57.]

Way of Necessity—Election—Appurtenances—Exception in Conveyance.

A contract to sell land with the appurtenances does not pass a right to a way to the land sold which the vendor has used over adjoining land of his own.

Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there are to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select.

By an agreement, dated the 19th of December, 1877, the trustees and executors of *T. J. Bolton* agreed to sell to the School Board for *London*, "First, all those the several messuages or tenements described in the first schedule hereto, with their appurtenances and the inheritance thereof in fee simple free from incumbrances, but subject to the several indentures of lease of the same premises respectively specified in the said first schedule hereto; and all such, if any, interest as the said vendors possess over the yard in *Buckingham Mews*;" and secondly, certain adjoining leaseholds specified in the second schedule, and called *Buckingham Terrace*, and which were situated between *Buckingham Mews* and *Lonsdale Road*.

The freeholds specified in the first schedule consisted of two rows of houses on each side of *Buckingham Mews*, to which there was access by two roads, one at the west leading into *Portobello Road*, the other at the east leading into *Lonsdale Road*; both roads of access being shewn in the plan annexed to the agreement, and both being over land of the vendors.

A draft conveyance was sent by the School Board to the vendors, containing a grant of the lands, "together with all erections, fixtures, ways, lights, rights, privileges, easements, and appurtenances whatsoever to the said pieces or parcels of land and hereditaments respectively or any part thereof respectively appertaining, or with the same or any part thereof now or heretofore enjoyed or reputed as part or member thereof." The vendors

struck out the words "or with the same or any part thereof now or heretofore enjoyed," and added words excepting the right of way into *Portobello Road*, but expressly granting a right of way into *Lonsdale Road*.

The School Board objected to the exception of the right of way into *Portobello Road*, and the vendors took out a summons in a suit for the administration of the estate of *T. J. Bolton* to have the conveyance settled by the Court. Both parties desired to have the point settled by the conveyance.

J. Pearson, Q.C., and *D. Jones*, for the vendors:—

No doubt both ways have existed over land belonging to the vendors, but the purchasers have not contracted for any right of way, and are only entitled to one right of way, which the vendor will give, and as there are now two ways the conveyance ought to make it clear which is to be the way. Moreover, the School Board are not ordinary purchasers, and must not take from the vendor more than they want. In this case it is doubtful whether they have a right as of necessity to any road, for they must buy the freehold of the leaseholds which we have sold, and then they will have access to a public road over their own land.

Higgins, Q.C., and *Simmonds*, for the Plaintiffs in the suit, referred to *Wood* v. *Saunders* (1).

North, Q.C., and *Kirby*, for the School Board:—

The purchasers have a right to a conveyance in the ordinary form, and to take such appurtenances as belong to the land sold, without any expressed exception.

[FRY, J.:—The vendor often submits to the insertion of general words which include more than the purchaser is strictly entitled to, and I have in settling a draft sometimes struck them out.]

Moreover, all rights of way are included with the appurtenances in the contract: *Langley* v. *Hammond* (2); *Watts* v. *Kelson* (3). The property must be dealt with as it stood at the time. The plan annexed to the contract shewed both roads: *Kay* v. *Oxley* (4);

(1) Law Rep. 10 Ch. 582.
(2) Ibid. 3 Ex. 161.
(3) Law Rep. 6 Ch. 166.
(4) Ibid. 10 Q. B. 360.

FRY, J. 1879 BOLTON v. BOLTON.

Denny v. *Hancock* (1). This is not a compulsory purchase, and the School Board have the same rights as an ordinary purchaser: *Clark* v. *School Board for London* (2).

J. Pearson, in reply:—

If the Board is entitled to a right of way, we give one; but we have a right to give it where we please: *Gale* on Easements (3).

[FRY, J., as to the right of election, referred to *Vin.* Abr., Election; *Rumble* v. *Heygate* (4).]

If the purchaser could choose his way, the vendor would lose his rights over the rest of his land, and could not deal with it.

May 10. FRY, J.:—

The question which arises for decision on this summons is as to the proper form of conveyance to be executed under a contract between the School Board for *London* and the trustees of the estate of the late Mr. *Bolton*.

The contract for the sale of the property does not contain any words with regard to the right of way. In my view, therefore, the contract was for the conveyance of the premises with all that was appurtenant or appendant to them and nothing more. Mr. *Bolton's* trustees are perfectly willing to grant a right of way over the road which leads into *Lonsdale Road;* but they decline to grant a right of way over a road which leads into *Portobello Road*. The School Board contend that they are entitled to the latter right of way.

The first question then is, Was the way into *Lonsdale Road*, or was the way into *Portobello Road* appurtenant or appendant to *Buckingham Mews*, the property contracted for? In my opinion neither of the ways was either appurtenant or appendant. The common words "with all ways thereunto appertaining," strictly and properly speaking, never carry a right of way over another tenement of the grantor; and for this simple reason: When a man who is owner of two fields walks over one to get to the other,

(1) Law Rep. 6 Ch. 1.
(2) Ibid. 9 Ch. 120.
(3) 5th Ed. p. 149.
(4) 18 W. R. 749.

that walking is attributable to the ownership of the land over which he is walking, and not necessarily to the ownership of the land to which he is walking. If authority is necessary, the two cases of *Harding* v. *Wilson* (1) and *Barlow* v. *Rhodes* (2) have decided that these words, strictly speaking, do not carry a right of way over the grantor's own land. Therefore, in my judgment, the right of way claimed cannot be claimed as appurtenant or appendant to the property contracted for.

The next question is, Can the grantee claim a right of way of necessity? for it is clear that the grantee cannot be entitled to two ways of necessity.

It is objected by the vendors that though a grantee may in most cases make this claim, yet in this case the School Board cannot; for the Board has purchased for the purpose of erecting school-houses and providing school accommodation, but as they cannot do that until they have obtained the reversion of the *Buckingham Terrace* property, it must be assumed that they will obtain that reversion; and then they will have a right of way to *Buckingham Mews* over their other freehold. That argument does not appear to me to be sound, and for this reason: The School Board, acting with perfect propriety, acquire the leasehold interest in the *Buckingham Terrace* property, yet it may be that before they have purchased the reversion they will find that the land is superfluous, and so may desire to part with their leasehold interest without acquiring the freehold. I think, therefore, that the School Board are entitled to one right of way of necessity over the freehold of Mr. *Bolton* as incident to the grant of *Buckingham Mews*.

Then arises the question, In whom is the right to elect which of the two rights of way shall be granted? I shall not in this case go into the general doctrine of election, because it appears to me that the matter is settled by authority. The authorities determine that the right of election is in the person who creates the right of way, in other words, in the grantor. The first case on the subject is *Clarke* v. *Rugge* (3). That case lays down the general rule that where a man grants a close which is landlocked, and is also the owner of an adjoining close, the grantee shall have a right of way over the adjoining close as incident to the grant;

(1) 2 B. & C. 96. (2) 1 C. & M. 439. (3) 2 Roll. Abr. 60, pl. 17.

FRY, J.
1879
BOLTON
v.
BOLTON.

for otherwise the grantee cannot have any benefit from the grant. "And the feoffor shall assign the way where he can best spare it." The next case which throws light on the subject is *Packer* v. *Welsted* (1). That is the converse case; that is to say, it is a case in which the owner of two tenements disposed of the outer tenement and retained the inner or landlocked tenement. It was held that he would have a right of way over the outer tenement, and that he would have the right of selecting the way. There again the grantor, the person who created the right of way, had the right to select the way. Both these cases were considered in a much more recent case, *Pearson* v. *Spencer* (2). There *Blackburn*, J., in delivering the considered judgment of the Court, after referring to the two authorities I have cited, said: "In each case it seems to have been thought that the person by whose act the way was created was subsequently to select the way subject only to this, that it should be a convenient way." Now, no evidence or argument has been addressed to me to shew that the way into *Lonsdale Road* is not a convenient way. I assume it therefore to be such, and I hold that the right of election was in Mr. *Bolton's* trustees.

The conveyance, therefore, must contain words to this effect, "Including a right of way for all purposes over the strip of land coloured green (at the east end of *Buckingham Mews*) into *Lonsdale Road*, but not including any right of way over the strip of land coloured brown (at the west end of *Buckingham Mews*) into *Portobello Road*."

I think that as this was a very fair question upon the construction of the contract no costs should be awarded on either side. The costs of the trustees will be costs in the cause.

Solicitors for trustees of the will: *Allen & Edwards.*
Solicitors for Plaintiff in the suit: *Cronin & Rivolta.*
Solicitors for School Board: *Gedge, Kirby, & Millett.*

(1) 2 Sid. 111. (2) 1 B. & S. 571, 585; 3 B. & S. 761.

END OF VOL. XI.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

In the First Series,
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In the Third Series,
1 App. Cas.

INDEX.

ABANDONED APPEAL - - 118, 913
See PRACTICE. 2, 9.

ABSCONDING DEBTOR—Foreigner - 298
See BANKRUPTCY. 2.

ABSOLUTE GIFT—Power to appropriate any part
See WILL. 1. [385

ACT OF BANKRUPTCY — Assignment of all debtor's property - - - 539
See BANKRUPTCY. 1.

ACTION—Joinder of causes of action - 905
See PRACTICE. 23.

—— Shareholder on behalf of others - 97
See COMPANY. 4.

ADMINISTRATION—*Action—Costs—Direction by Testator that "Testamentary Expenses" shall be paid out of a particular Fund.*] A testator directed by his will that his "testamentary expenses" should be paid out of a specified part of his estate:—*Held*, that the costs of a suit to administer the estate were included under "testamentary expenses." PENNY *v.* PENNY - 440

2. —— *Conversion—Reconversion—Election to take Property in its actual state.*] The *H. P.* estate was vested in *H.*, *D.*, and *S.*, upon trust after the death of a person who died in August, 1863, to sell with all convenient speed. The proceeds of sale belonged as to one moiety to *D.'s* wife absolutely for her separate use, subject to a charge of £500 to a legatee, and as to the other moiety to *S.* absolutely. The property was well adapted for building purposes, but the bulk of it was subject to an old lease of which twenty-six years were unexpired. In March, 1864, *D.* and wife paid off the £500. In 1864, the three trustees let for the three years part of the property not comprised in the old lease, and in 1867, and again in 1869, *D.* and *S.* who had survived *H.*, granted similar leases for three years. In 1865, *S.*, who was the acting trustee and managed the property, had plans prepared by a surveyor for laying out the property for building. In the same year a

ADMINISTRATION—*continued.*

bill was brought into Parliament for authorizing a railway to pass through the estate, and a petition against it was presented on behalf of "the owners and trustees of the *H. P.* estate," which stated that it was their intention to lay out the estate for building. Mrs. *D.* died in 1870, in the lifetime of her husband. There was no direct evidence that she had concurred in the leases, the preparation of the plans, or the petition to Parliament:—*Held*, that the parties had elected to take the property as real estate, and that Mrs. *D.'s* share went to her heir-at-law as realty, and not to her husband as personalty. *In re* DAVIDSON. MARTIN *v.* TRIMMER. DAVIDSON *v.* TRIMMER [C. A. 341

3. —— *Jurisdiction—Domicil—Scotch Assets—Limited Administration.*] Where the Probate Division of the High Court of Justice has granted a general probate of the will of a testator domiciled in *Scotland*, the Chancery Division will make the ordinary decree for the administration of the personal estate of the testator, without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors.—The decision of *Hall*, V.C., affirmed. STIRLING-MAXWELL *v.* CARTWRIGHT - - - C. A. 522

ADMISSION IN PLEADING—Partition action—Order for sale - - - 213
See PARTITION. 2.

AFFIDAVIT—Prolixity—Costs - - 1
See PRACTICE. 27.

AFFIRMATIVE EASEMENT—Prescription 852
See NOISE.

AFTER-ACQUIRED PROPERTY — Covenant to settle - - - - 745
See SETTLEMENT. 2.

—— Insolvent - - - - 48
See INSOLVENCY.

AGENT—Banker—Following money 772, 773, n.
See BANKER. 1, 2.

AGREEMENT—Lease for any term the tenant wishes - - - - 129
See Landlord and Tenant.
—— Notice of - - - - 790
See Light and Air.
—— Partnership—Agreement to provide capital
See Partnership. [261
—— To dispose of property by will - 267
See Joint Tenant.

ALLOWANCE—Money expended by promoter of company - - - - 918
See Company. 1.

AMENDMENT—Petition for liquidation - 724
See Bankruptcy. 18.
—— Pleading - - - - 436
See Practice. 1.

ANCIENT LIGHTS - - - - 790
See Light and Air.

ANNUITY—Corpus or income - - 891
See Will. 2.
—— Covenant to pay—Proof in bankruptcy 914
See Bankruptcy. 10.

APPEAL—Abandoned motion - 118, 913
See Practice. 2, 9.
—— Bankruptcy - - - 56, 911
See Bankruptcy. 16, 17.
—— Cross notice - - - 1, 539, 873
See Practice. 3, 4, 27.
—— Security for - - - - 741
See Practice. 5.
—— Stay of proceedings - - 136, 576
See Practice. 6, 28.

APPORTIONMENT—*Rent—Real and Personal Representatives—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35), *s.* 2—*Will executed before Act—Codicil executed after Act—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.] The *Apportionment Act*, 1870, applies to every will executed before, and confirmed by a codicil executed after, its passing; and, *semble*, also to every will coming into operation after its passing.—A testator, by a will executed before the passing of the *Apportionment Act*, 1870, bequeathed his residuary personalty to trustees upon certain trusts; and he devised his real estate to trustees on certain trusts, and, subject thereto, to his son for life, with remainders over in strict settlement. But he provided that his son should not take any estate under the will unless he, within a year after the testator's death, executed a settlement of certain other real estate, upon limitations corresponding to those created by the will of the devised real estate. And the testator gave the clear and undisposed of rents of his real estate to trustees, upon trust for the son, if he should make the settlement required of him within the year, and, if not, then upon trust for the persons who would thereupon become entitled to the devised real estate. By a codicil, executed after the passing of the Act, the testator made some alterations in his will, and in all other respects confirmed it. The son executed the settlement required of him within a year after the testator's death:—*Held*, that the rents of the devised real estate accruing due at the time of the testator's death must be apportioned between

APPORTIONMENT—*continued.*
the son and the persons interested in the residuary personalty.—*Hasluck* v. *Pedley* (Law Rep. 19 Eq. 271) followed. Constable *v.* Constable - 681
—— Costs—Construction - - - 416
See Practice. 10.

APPROPRIATION—Specific—Bills of exchange—Fraudulent preference - - 306
See Bankruptcy. 6.
—— Water - - - - - 782
See Mine.

APPURTENANCES—Right of way - - 968
See Way. 2.

ARREST—Foreigner—Temporary residence in *England* - - - - 298
See Bankruptcy. 2.

ARTICLES OF ASSOCIATION—Table A. of *Companies Act*, 1862 - - - 900
See Company. 5.

ASSIGNEE—Official—Insolvency - - 48
See Insolvency.

ASSIGNMENT—All debtor's property - 539
See Bankruptcy. 1.
—— Covenant - - - 273, 866
See Covenant. 1, 3.
—— Debt - - - - - 198
See Assignment of Debt.

ASSIGNMENT OF DEBT—*Equitable Chose in Action—Notice—Second Assignment by Legal Personal Representative of Cestui que Trust—Priority—Purchaser without Notice.*] Upon the principle in *Dearle* v. *Hall* (3 Russ. 1), the right to priority which a second assignee of an equitable interest in a fund, who has given notice of his assignment to the trustees, possesses over a first assignee who has failed to give notice, subsists equally where the second assignee has taken his assignment from the legal personal representative of the *cestui que trust*, and not from the *cestui que trust* himself. *A.* assigned to *B.* his equitable interest in a fund under the will of *X.*, but omitted to give notice to the trustees. *A.* died, having by will bequeathed all his property to his executrix, who then assigned to *C.*, a purchaser for value without notice of the prior assignment, all the property under the will of *X.* to which she was entitled as *A.'s* legal personal representative, and *C.* thereupon gave notice of his assignment to the trustees of *X.'s* will. Afterwards the representatives of *B.*, who had died, gave similar notice of his assignment:—*Held*, that the fund belonged to *C.*, he having been the first to give notice. *In re* Freshfield's Trust - - - - - 198

ATHEISM—Custody of infant—Education 508
See Infant. 1.

ATTACHMENT—Service of - - - 168
See Practice. 8.

ATTORNEY-GENERAL—Duty to interfere when public company exceeds its powers 449
See Railway. 2.

BANKER—*Agent—Following Money—Priority.*] A banking company were employed as agents to collect money and to remit it to their employers. The bank received the money in cash, placed it

BANKER—*continued.*

with the other cash of the bank, and informed their employers that the money had been remitted; but before the money was actually remitted the bank went into liquidation:—*Held*, that the money was part of the general assets of the bank, and that the employers of the bank were not entitled to be paid in priority to the other creditors.—*Pennell* v. *Deffell* (4 D. M. & G. 372) considerad. *In re* WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK. *Ex parte* DALE & CO. - - - - - - 772

2. —— *Agent — Following Money — Priority.*] *B.* was employed as the agent of certain trustees to collect the rents of the trust estates. He paid the money collected to his own account at his bankers. He afterwards died:—*Held* that the trustees were entitled to follow the sums paid to *B.*'s account and to have them paid over to them. BIRT *v.* BURT - - - - C. A. 773, n.

BANKRUPTCY—*Act of Bankruptcy—Assignment of whole of Grantor's Property—Consideration—Forbearance to enforce former Bill of Sale of same Property.*] The forbearance of the grantee under a bill of sale of the whole of the grantor's property, given for value, to seize the property comprised in it is not, as against the trustee in bankruptcy of the grantor, good consideration for the giving of a new bill of sale in lieu of the first, but the new bill of sale given under such circumstances without any fresh advance to the grantor is an act of bankruptcy, and void as against the trustee in bankruptcy of the grantor.—*Ex parte Cooper* (10 Ch. D. 313) followed. *Ex parte Stevens* (Law Rep. 20 Eq. 786) approved. *Ex parte* PAYNE. *In re* CROSS - - - - C. A. 539

2. —— *Debtor's Summons—Absconding Debtor—Foreigner temporarily in England returning Home—Intention to avoid Payment of Debt—Arrest—Absconding Debtors Act*, 1870 (33 & 34 *Vict. c.* 76), *s.* 1.] When a debtor's summons is issued against a foreigner, who is in *England* for a merely temporary purpose, and he then prepares to return home, there is no presumption (as there might be in the case of a domiciled Englishman going abroad) that he is going away with the intention of avoiding payment of the summoning creditor's debt. *Ex parte* GUTIERREZ. *In re* GUTIERREZ [C. A. 298

3. —— *Debtor's Summons—Bankruptcy Petition—Tender of Part of Debt—Refusal to accept—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 7, 8, 9.] In an action upon a bill of exchange for £40 an order was made staying the proceedings on the Defendant's undertaking to pay to the Plaintiffs (in addition to £20 which had been paid into Court) £20 10*s.* and the costs of the action. In default of payment the Plaintiffs were to be at liberty to sign judgment and issue execution. The costs having been taxed at £9 2*s.*, the Defendant tendered £29 14*s.* 6*d.* to the Plaintiffs, but they refused to accept it unless the Defendant would also pay another overdue acceptance of his for £30 which the Plaintiffs held. He refused to pay the £30, alleging that that acceptance had been obtained from him by fraud, with notice of which the Plaintiffs had taken it. The Plaintiffs then issued a debtor's summons against the Defendant for £59 14*s.* 6*d.* The Defendant applied to dismiss it, and he was ordered to give security for the amount claimed. The security not having been given, the Plaintiffs presented a bankruptcy petition against him:—*Held*, that until judgment had been signed in the action, the £29 14*s.* 6*d.* could not be used to support a debtor's summons, and consequently that there was not a debt sufficient to support a bankruptcy petition. — *Per James*, L.J.:—The debtor's summons ought to have been dismissed. *Ex parte* ASTRUP. *In re* LE FEVRE - - - - C. A. 303

4. —— *Disclaimer—Trustee in Bankruptcy—Expired Lease—Leave of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23)—*Bankruptcy Rules*, 1871, *r.* 28.] A lease of a house was vested in a bankrupt as assignee. The trustee in the bankruptcy did not disclaim the lease, but he did not take possession of the property or exercise any act of ownership over it. The bankrupt continued to live in the house, his friends paying the rent for him. After the expiration of the term the lessor sued the original lessee on his covenant to repair, claiming £400 damages. The lessee served a third party notice on the trustee, claiming to be indemnified by him, as assignee of the term, against all breaches of the covenant since the date of the bankruptcy and the trustee's appointment. The trustee then applied to the Court of Bankruptcy for leave to execute a disclaimer in respect of the lease. The lessor opposed the application, and the Registrar refused it on the ground that the lease had expired. The trustee appealed, giving notice to the lessor, who did not appear on the hearing of the appeal:—*Held*, that leave to disclaim might be given, as it could not prejudice the rights of any person who was not before the Court. *Ex parte* PATERSON. *In re* THROCKMORTON - - - C. A. 908

5. —— *Disclaimer—Trustee in Bankruptcy—Proof for Damages—Lease for Term determinable by Lessee—Measure of Damages—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23.] A lease of a house for twenty-one years, at a rent of £130 a year, was determinable by the lessee at the end of the first seven or fourteen years of the term on his giving six months' previous notice in writing to the lessor, and paying the rent and performing the covenants up to the day of the term being determined. Near the end of the sixth year of the term the lessee filed a liquidation petition. The trustee in the liquidation disclaimed the lease. There was evidence that the house could only be let at a diminished rent:—*Held*, that the lessor was entitled to prove in the liquidation for the diminution in the rent up to the end of the seventh year of the term, and the amount necessary to put the house in repair. *Ex parte* BLAKE. *In re* MCEWAN [C. A. 572

6. —— *Fraudulent Preference—Repayment of Money sent to meet Specific Bills—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.] The provisions of sect. 92 of the *Bankruptcy Act*, 1869, apply only to transactions between a debtor and persons who are, in the strict sense of the words, his creditors.—In September remittances to the amount of £5300 were sent by a firm at *Glasgow* to a firm in *London*, to enable the latter to take

up some bills of exchange, drawn by the *Glasgow* firm upon and accepted by the *London* firm, which were to become due on the 5th of October, the arrangement between the two firms being that the *Glasgow* firm should provide the funds to meet the bills at maturity. The *London* firm kept a banking account at the *Bank of England*, for the purpose of meeting all their acceptances, and intended that the £5300 should be paid to that account, but, through the mistake of a clerk, only £3300 was paid there, £2000 being paid to the *London Joint Stock Bank*, where the *London* firm kept their general banking account. On the 2nd of October the *London* firm found that they were insolvent, and called in an accountant to investigate their affairs, and on the 3rd of October they announced to their creditors that they had suspended payment. On the 2nd of October they drew a cheque for £5300 on the *Bank of England* (to which they then supposed that all the remittances of the *Glasgow* firm had been paid), intending to repay it to the *Glasgow* firm, but their solicitors advised them that it was doubtful whether they could legally do so, and the £5300 was thereupon placed in a third bank in the joint names of two of the partners of the *London* firm. On the 3rd of October they discovered the mistake of their clerk, and attempted to withdraw the £2000 from the *London Joint Stock Bank*, but could not do so, because that bank claimed a lien on the balance of their account. The *Glasgow* firm took up the bills at maturity, and the £3300 was paid to them. But the £2000 was placed in the hands of the accountant, pending the decision of the rights of the parties. On the 1st of November the *London* firm filed a liquidation petition, under which the accountant was appointed trustee of their property. They had not committed any act of bankruptcy before the filing of the petition:—*Held*, that, as the *London* firm never intended to misappropriate the £2000, the relation of debtor and creditor never arose in respect of it between them and the *Glasgow* firm, and consequently the *London* firm could properly have employed and ought to have employed the £2000 in meeting the bills on the 5th of October.—The trustee was therefore ordered to pay the £2000 to the *Glasgow* firm. *Ex parte* Kelly & Co. *In re* Smith, Fleming, & Co. [C. A. 306

7. —— *Jurisdiction — Distinction between Transactions void as against Bankrupt himself and Transactions not void as against him but void as against his Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.] Where a trustee in bankruptcy claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals. But where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt (where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy), the Court of Bankruptcy ought to decide the matter itself. *Ex parte* Brown. *In re* Yates C. A. 148

8. —— *Jurisdiction — Liquidation — Debtor Mortgagor—Action by Equitable Second Mortgagees for Redemption and Foreclosure—Order in Bankruptcy restraining the Action, discharged.*] An equitable second mortgagee commenced an action against the liquidation trustee of the mortgagor, and the first mortgagees, claiming an equitable charge on the property, redemption against the second mortgagees, and, if necessary, foreclosure.—Order of County Court in bankruptcy restraining the action, discharged. *Ex parte* Hirst. *In re* Wherly - - 278

9. —— *Jurisdiction—Time for taking Objection—32 & 33 Vict. c.* 71, *s.* 72.] An objection to the exercise of the extraordinary jurisdiction conferred on the Court of Bankruptcy by sect. 72 of the *Bankruptcy Act*, 1869, ought to be taken at the earliest opportunity, and it is too late to take such an objection after the objecting party has taken the chance of a decision in his favour on the merits.—But the Court itself may at any time decline *mero motu* to exercise the jurisdiction. *Ex parte* Swinbanks. *In re* Shanks C. A. 525

10. —— *Proof—Contingent Liability — Covenant to pay Annuity—Valuation—Death of Annuitant after Payment of Dividend—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] A bankrupt had covenanted to pay a life annuity to trustees for the benefit of his wife. The annuity was valued, and proof was made by the trustees for the amount thus ascertained, and a dividend was paid to them. The wife died, and the dividend which the trustees had received exceeded the amount of the payments of the annuity which the bankrupt would have had to make if he had remained solvent:—*Held* (reversing the decision of the Registrar), that the trustees could not be called upon to refund the excess of the dividend above the payments of the annuity which accrued due during the wife's life.—*Ex parte Wardley* (6 Ch. D. 790) distinguished. *Ex parte* Bates. *In re* Pannell - - - - C. A. 914

11. —— *Proof—Double Proof — Two Firms composed of the same Members—Bills drawn by one Firm on the other—Estate administered in different Countries—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 37.] In order that double proof may be admitted under sect. 37 of the *Bankruptcy Act*, 1869, it is necessary (just as it was under sect. 152 of the *Bankruptcy Act*, 1861) that there should be distinct estates to be wound up in bankruptcy.—Two firms, consisting of the same members, which carried on business, the one in *London* and the other at *Oporto*, became bankrupt. The Portuguese firm had drawn bills of exchange on the *London* firm, which the latter had accepted:—*Held*, that the holders of the bills, who had received a dividend under the Portuguese liquidation, could not prove in respect of the bills in the *London* liquidation without giving credit for what they had received in *Portugal*. *Ex parte* Banco de Portugal. *In re* Hooper C. A. 317

12. —— *Secured Creditor — Foreign Attachment—Lord Mayor's Court—Liquidation—Creditor "holding Security"—Bankruptcy Act*, 1869, *s.* 12.] A creditor who has served a writ of foreign attachment in an action in the Court of the Lord Mayor of *London* is a "creditor holding security upon the property of the debtor" within

BANKRUPTCY—*continued.*

the meaning of sect. 12 of the *Bankruptcy Act*, 1869, although the presentation of a liquidation petition by the debtor, followed by an interpleader order, has prevented the creditor from proceeding to judgment in the action. LEVY *v.* LOVELL 220

13. —— *Secured Creditor—Judgment Creditor—Elegit—Receiver—Delivery of Land in Execution*—27 & 28 *Vict. c.* 112, *s.* 1—*Bankruptcy Act*, 1869, *s.* 16, *sub-s.* 5.] A judgment creditor became transferee of a mortgage of real estate belonging to the debtor. He then issued a writ in an action in the Chancery Division claiming an account of what was due to him on both mortgage and judgment, with payment, and other relief; and on the same day obtained an *ex parte* order for an interim receiver extending over seven days. At the expiration of the seven days he obtained, on motion upon notice, an order absolute for appointment of the same person to be receiver. On the same day the debtor filed a liquidation petition, and a motion in bankruptcy by the liquidation trustee to stay the action was refused.—The creditor had not sued out an elegit:—*Held*, that the appointment of the receiver was such a delivery in execution by lawful authority of the mortgaged lands within sect. 1 of the 27 & 28 Vict. c. 112, as to render the judgment creditor a "secured creditor" within sect. 16, sub-sect. 5, of the *Bankruptcy Act*, 1869; and that he was entitled to hold the lands comprised in the mortgage deed as a security for his judgment as well as for his mortgage debt. *Ex parte* EVANS. *In re* WATKINS - - - - - 691

14. —— *Secured Creditor—Mortgagor and Mortgagee — Valuation of Security — Proof in Bankruptcy for Balance of Debt—Costs of Mortgagee's unsuccessful Defence of Title to Part of Mortgaged Property.*] A bankrupt had, before his bankruptcy, obtained advances from a bank on the security of the deposit with them of the dock warrants of a quantity of tobacco, which he represented to be his own property. After the adjudication it was discovered that fifty bales of the tobacco did not belong to him, but that he had sold them and had received the purchase-money; the purchaser having left the dock warrants relating to them with him to enable him to clear them as the purchaser should require them. After the adjudication the purchaser of the fifty bales sued the bank, and recovered from them as damages the sum which he had paid for the fifty bales, together with his costs of the action, and the judgment was affirmed by the Court of Appeal. The bank afterwards tendered a proof in the bankruptcy for the balance of their debt beyond the value of their security:—*Held*, that, in estimating that value, they were entitled to bring into account the costs (their own as well as the Plaintiff's) of the action, but not the costs of the appeal.—*Ex parte Stephens* (2 Mont. & A. 31) disapproved.—After the decision of the appeal, the bank sold the fifty bales for less than the purchaser had paid the bankrupt for them:—*Held*, that, there being no evidence that this loss had arisen from any default on the part of the bank, they were entitled to bring that loss into account in estimating the value of their security. *Ex parte* CARR. *In re* HOFMANN - C. A. 62

BANKRUPTCY—*continued.*

15. —— *Sequestration of Profits of Benefice—Beneficed Clergyman—Trustee in Bankruptcy—Priority—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 88.] *Held*, by *James* and *Cotton*, L.JJ. (*dissentiente Brett*, L.J.), that the effect of sect. 88 of the *Bankruptcy Act*, 1869, is only to give priority to a sequestration issued by the trustee in the bankruptcy of a beneficed clergyman over a sequestration issued by an individual creditor in respect of a debt provable in the bankruptcy, but that the section has no application as between sequestrations issued by the trustees in two different bankruptcies.—*Held*, by the Court unanimously, that the fact that a bankrupt beneficed clergyman has obtained an order of discharge does not prevent the trustee in the bankruptcy from issuing a sequestration of the profits of the benefice which the bankrupt held at the time of the bankruptcy. *Ex parte* CHICK. *In re* MEREDITH - - - - - C. A. 731

16. —— *Practice—Appeal—Locus Standi of Appellant—"Person aggrieved" by Order—Alleged Creditor of Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 71.] A person who alleges himself to be a creditor under a bankruptcy, but who has omitted for several years to prove his debt in the regular way, is not a "person aggrieved" within the meaning of sect. 71 of the *Bankruptcy Act*, 1869, by the refusal to make an order the result of which, if made, would be to increase the assets available for the creditors, and is, therefore, not entitled to appeal from the refusal. *Ex parte* DITTON. *In re* WOODS - - C. A. 56

17. —— *Practice—Bankruptcy Petition—Representation of Debtor's Estate—Appeal by Receiver before Appointment of Trustee.*] After the presentation of a bankruptcy petition and the appointment of a receiver, but before the appointment of a trustee, an order was made that the receiver should deliver up to the applicants some bills of exchange which had come into his hands, on the ground that they did not form part of the debtor's estate. Notice of the application had been addressed to the receiver, the debtors, and the petitioning creditor. Notice of appeal was given in the name of the receiver alone:—*Held*, that the notice must be amended by naming the debtors and the petitioning creditor also as Appellants.—This having been done, the order was affirmed on the merits. *Ex parte* CHALMERS. *In re* SAWERS - - - - C. A. 911

18. —— *Practice—Liquidation Petition—Misdescription of Debtor—Registration of Resolutions—Amendment of Petition—Locus Standi—Creditor withdrawing Proof at First Meeting—Right to appear before Registrar and oppose Registration—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 82—*Bankruptcy Rules*, 1870, *rr.* 273, 295—*Bankruptcy Forms*, 1870, *No.* 106.] A farmer, who had also carried on the business of a cattle dealer, filed a liquidation petition, in which he gave his correct address, but described himself only as a cattle dealer:—*Held*, by *Bacon*, C.J., and by the Court of Appeal, that this was not a misdescription such as to invalidate the proceedings, and that the resolutions passed by the creditors ought to be registered.—*Ex parte Jerningham* (9 Ch. D. 466)

BANKRUPTCY—*continued.*

distinguished.—But leave was given to amend the petition by adding the description "farmer."—A person who alleged that he was a creditor tendered a proof of debt at the first meeting of the creditors, but withdrew it. He attended before the Registrar to oppose the registration of the resolutions passed by the creditors.—*Held*, by *Bacon*, C.J., and *semble*, *per James*, L.J., that the objector had no *locus standi*, and the Registrar could not put his proof on the file for the purpose of giving him a *locus standi*. *Ex pare* Kirkwood. *In re* Mason - - - - C. A. 724

19. —— *Practice—Vacating Appointment of Trustee—Proof improperly rejected.*] It is the settled practice of the Court of Bankruptcy not to vacate the appointment of a trustee merely because a proof has been improperly rejected.—In order to induce the Court to vacate the appointment, special circumstances—such as that the rejection of the proof has been procured by fraud—must be shewn. At any rate an application for such an order must be made very promptly after the rejection of the proof.—*Ex parte Crowther* (24 L. T. (N.S.) 330) not followed. *Ex parte* Kimber. *In re* Thrift - C. A. 869

BANKRUPTCY RULES, 1870, rr. 273, 295 724
See Bankruptcy. 18.

—— **Form No. 106** - - - 724
See Bankruptcy. 18.

—— **1871, r. 28** - - - - 908
See Bankruptcy. 4.

BENEFICE—Bankruptcy—Sequestration 731
See Bankruptcy. 15

BILL OF COSTS—Taxation after payment 150
See Solicitor. 2.

BILLS OF SALE ACT—*Registration—Sale of growing Crops—Rights of Grantee under subsequent Bill of Sale—Protected Transaction*—32 & 33 *Vict. c.* 71, *ss.* 6, 94, 95.] A bill of sale of growing crops does not require registration under the *Bills of Sale Act*, 1854.—*Brantom* v. *Griffits* (1 C. P. D. 349; 2 C. P. D.212) followed.—On the 2nd of May a farmer executed a bill of sale of his furniture and growing crops, being the whole of his property, to *P.*, theonly consideration for it being the forbearance of *P.* to seize the property under a bill of sale given to him four months previously, as he alleged, for value, and not registered. On the 3rd of May the grantor gave a bill of sale of the same property to *C.* in consideration of a present advance of money. *C.* had no notice of *P.'s* bill of sale. Neither of the bills of sale was registered. *C.* took possession of the property on the 20th of August, and *P.* on the 23rd of August. On the 26th of August the grantor filed a liquidation petition, and on the 1st of October he was adjudicated a bankrupt:—*Held*, that *P.'s* bill of sale was void as against the trustee in bankruptcy of the grantor as an act of bankruptcy, and that *C.'s* bill of sale, so far as regarded the furniture, was also void as against the trustee for want of registration, notwithstanding the fact that he had no notice of the act of bankruptcy to which the trustee's title related back.—*Ex parte Attwater* (5 Ch. D. 27) followed.—But, as to the growing crops, *held*, that *C.'s* bill of sale was a protected transaction by virtue of sects. 94 and 95 of the *Bankruptcy Act*, 1869, and was

BILLS OF SALE ACT—*continued.*

therefore good as against the trustee.—Decision of *Bacon*, C.J., reversed in part.—The fact that a bill of sale is set aside as void against the trustee in bankruptcy of the grantor does not entitle the trustee to stand in the place of the grantee, and thus acquire priority over the grantee under a valid bill of sale subsequently executed by the grantor.—*Ex parte Leman* (4 Ch. D. 23) followed. *Ex parte* Payne. *In re* Cross - C. A. 539

BUILDING ACT - - - - 412
See Metropolitan Building Act.

BUILDING SPECULATION—Partnership - 261
See Partnership.

CAPITAL—Agreement to provide - - 261
See Partnership.

CARRIER—Stoppage *in transitu* - - 68
See Sale of Goods. 1.

CASES—*Attorney-General* v. *Great Northern Railway Company* (1 Dr. & Sm. 154) considered - - - - 449
See Railway. 2.

—— *Attwater, Ex parte* (5 Ch. D. 27), followed
See Bills of Sale Act. [539

—— *Baker* v. *Baker* (6 H. L. C. 616) distinguished
See Will. 2. [891

—— *Barker* v. *Greenwood* (2 Y. & C. Ex. 414) distinguished - - - 525
See Solicitor. 1.

—— *Beauchamp* v. *Winn* (Law Rep. 6 H. L. 223) considered - - - - 798
See Common.

—— *Brantom* v. *Griffits* (2 C. P. D. 212) followed
See Bills of Sale Act. [539

—— *Chesterfield Colliery Company* v. *Black* (24 W. R. 783) followed - - 439
See Practice. 20.

—— *Cooper, Ex parte* (10 Ch. D. 313), followed
See Bankruptcy. 1. [539

—— *Crowther, Ex parte* (24 L. T. (N.S.) 330), not followed - - - - 869
See Bankruptcy. 19.

—— *Davis* v. *Ashwin* (47 L. J. (Ch.) 70) questioned - - - - 204
See Practice. 17.

—— *Dearle* v. *Hall* (3 Russ. 1) followed - 198
See Assignment of Debt.

—— *De Serre* v. *Clarke* (Law Rep. 18 Eq. 587) discussed - - - - 745
See Settlement. 2.

—— *Duckett* v. *Gover* (6 Ch. D. 82) explained 97
See Company. 4.

—— *Exton* v. *Scott* (6 Sim. 31) explained - 1
See Fraudulent Conveyance.

—— *Fox* v. *Fox* (Law Rep. 10 Eq. 286) distinguished - - - - 406
See Will. 6.

—— *Frowd's Settlement, In re* (10 L. T. (N. S.) 367) discussed - - - 745
See Settlement. 2.

—— *Gilbertson* v. *Richards* (5 H. & N. 453) followed - - - - 421
See Covenant. 2.

CASES—*continued.*

—— *Hall* v. *Byron* (4 Ch. D. 667) followed 798
See COMMON.

—— *Hammond* v. *Anderson* (1 B. & P. (N.R.) 69) distinguished - - - 68
See SALE OF GOODS. 1.

—— *Hasluck* v. *Pedley* (Law Rep. 19 Eq. 271) followed - - - - 681
See APPORTIONMENT.

—— *Hayes, In re* (9 W. R. 769), considered 652
See PARTITION. 3.

—— *Huntley* v. *Griffith* (F. Moore, 452) followed
See HUSBAND AND WIFE. 1. [442

—— *Ivory, In re* (10 Ch. D. 372), explained 741
See PRACTICE. 5.

—— *Jerningham, Ex parte* (9 Ch. D. 466), distinguished - - - - 724
See BANKRUPTCY. 18.

—— *Jones* v. *Jones* (8 M. & W. 431) distinguished
See SALE OF GOODS. 1. [68

—— *Leman, Ex parte* (4 Ch. D. 23) followed 539
See BILLS OF SALE ACT.

—— *Locking* v. *Parker* (Law Rep. 8 Ch. 30) explained - - - - 284
See LIMITATIONS, STATUTE OF.

—— *Merry* v. *Nickalls* (Law Rep. 8 Ch. 205) distinguished - - - - 136
See PRACTICE. 28.

—— *Miles* v. *Tobin* (16 W. R. 465) considered
See MINE. [790

—— *Native Ore Company, In re* (2 Ch. D. 345), distinguished - - - 579
See COMPANY. 3.

—— *Parker* v. *Greenwood* (2 Y. & C. Ex. 414) distinguished - - - 525
See SOLICITOR. 1.

—— *Pennell* v. *Deffell* (4 D. M. & G. 372) considered - - - - 772
See BANKER.

—— *Printing and Numerical Registering Company, In re* (8 Ch. D. 535), not followed 676
See COMPANY. 11.

—— *Ross* v. *Ross* (20 Beav. 645) approved 873
See WILL. 3.

—— *Sharp* v. *Taylor* (2 Ph. 801) discussed 170
See ILLEGALITY.

—— *Sinnett* v. *Herbert* (Law Rep. 7 Ch. 232) followed - - - - 949
See CHARITY.

—— *Slubey* v. *Heyward* (2 H. & Bl. 504) distinguished - - - - 68
See SALE OF GOODS. 1.

—— *Smith* v. *Buller* (Law Rep. 19 Eq. 473) disapproved - - - - 206
See PRACTICE. 12.

—— *Smith* v. *Smith* (Law Rep. 5 Ch. 342) followed - - - - 555
See WILL. 5.

—— *Stephens, Ex parte* (2 Mont. & A. 31), disapproved - - - - 62
See BANKRUPTCY. 14.

—— *Stevens, Ex parte* (Law Rep. 20 Eq. 786), approved - - - - 539
See BANKRUPTCY. 1.

CASES—*continued.*

—— *Viney* v. *Chaplin* (2 De G. & J. 468) followed - - - - 525
See SOLICITOR. 1.

—— *Vizard's Trusts, In re* (Law Rep. 1 Ch. 588)
See SETTLEMENT. 2. [745

—— *Wardley, Ex parte* (6 Ch. D. 790), distinguished - - - - 914
See BANKRUPTCY. 10.

—— *Watson* v. *Hayes* (5 My. & Cr. 125) followed
See WILL. 6. [406

CHARGING ORDER—Proceeding by summons or petition - - - - 942
See PRACTICE. 11.

CHARITY—*Legacy—Pure and Impure Personalty—Mortmain Act* (43 *Geo.* 3, *c.* 108)—*Particular Residue—General Residue—Lapse or Invalidity.*] A testatrix bequeathed certain specific portions of her personal estate to trustees upon trust for sale and conversion, payment of debts and legacies, investment and payment of the income to her mother for life, and, after her death, as to £2000, part of the fund, to pay the same to the vicar of *M.* to be disposed of at his discretion "in or about restoring, altering, and enlarging and improving the church, parsonage-house, and school" of *M.*; "and as to the residue thereof," upon the trusts thereinafter declared concerning the moneys to arise from the sale of her real estate. The testatrix then gave "all the rest, residue, and remainder of her personal estate" to her mother absolutely, and devised her real estate to the same trustees in trust for sale, and directed them to hold the sale moneys and the residue of the said trust moneys, stocks, funds, shares, and securities in trust for the children of *C.* absolutely.—Part of the property comprised in the bequest to the trustees consisted of impure personalty:—*Held*, first, that, the church being situate on land already in mortmain, there must be an inquiry to ascertain whether the parsonage-house and school, or which of them were or was also situate, and what sums of money would be required to be laid out in restoring, altering, and enlarging and improving such of the said three objects of the legacy as were or was so situate, and that the legacy was valid, so far as the objects were concerned, to the extent of the money so ascertained to be required:—Secondly, that (following *Sinnett* v. *Herbert* (Law Rep. 7 Ch. 232)) the amount of the legacy required for the objects already in mortmain must be apportioned between the pure and impure personalty, and be paid out of the pure personalty to the extent of its proportion, and, under 43 Geo. 3, c. 108, out of the impure personalty to the full extent of £500:—*Held*, also, that so much of the £2000 as failed passed to the legatees of the particular residue of the fund out of which it was given, and not under the general gift of residuary personal estate.—The construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift, nor is there any sound distinction between lapsed and invalid dispositions, whether under a power of appointment or in exercise of ownership. CHAMPNEY *v.* DAVY - - 949

CHOSE IN ACTION—Assignment of - 198
See ASSIGNMENT OF DEBT.

CHOSE IN ACTION—*continued.*
—— Married woman - - - 442
See Husband and Wife. 1.

CLASS—Gift to children and remoter issue 555
See Will. 5.

CLERGYMAN — Bankruptcy — Sequestration of benefice - - - - 731
See Bankruptcy. 15.

CLUB—*Power of Expulsion—Rights of Member—Misconduct—Duties of Club Committee—Injunction,*] The committee of a club, being a quasi-judicial tribunal, are bound, in proceeding under their rules against a member of the club for alleged misconduct, to act according to the ordinary principles of justice, and are not to convict him of an offence warranting his expulsion from the club without giving him due notice of their intention to proceed against him, and affording him an opportunity of defending or palliating his conduct: and the Court will, at the instance of any member so proceeded against, declare any resolution passed by the committee without previous notice to him, based upon *ex parte* evidence and purporting to expel him from the club, to be null and void, and will restrain the committee by injunction from interfering, by virtue of such a resolution, with his rights of membership. Fisher *v.* Keane - - - - - 353

COMMISSIONERS OF PATENTS - - 250
See Trade-mark. 1.

COMMITTEE OF CLUB - - - 353
See Club.

COMMON—*Common Appurtenant—Fold-course—Right of Lord to approve—Digging Gravel Pits—Inclosure round Warren-house—Curtilage—Statute of Merton* (20 *Hen.* 3), *c.* 4—*Statute of Westminster the Second* (13 *Edw.* 1), *c.* 46—*Grant—Construction—*"*Warren of Conies.*"] A fold-course is not a several right to the herbage, but a right of common appurtenant of pasture for sheep.—Lords of manor can by the *Statute of Merton* approve against common appurtenant of pasture. The proviso in the *Statute of Westminster the Second,* c. 46, only prevents derogation from an express grant.—A demise of "all that warren of conies in *L.*":—*Held,* by *Fry,* J., under the circumstances, to pass the soil of the warren and not merely a franchise.—*Hall* v. *Byron* (4 Ch. D. 667) followed.—Observations on *Earl Beauchamp* v. *Winn* (Law Rep. 6 H. L. 223). Robinson *v.* Duleep Singh [C. A. 798

COMPANY — *Liability of Promoter—Secret Profit — Allowance for Money bonâ fide expended.*] By an agreement between the vendors of a mine and *G.*, a financial agent, the vendors agreed to sell the mine to a company to be formed by *G.* for its purchase at the price named, and that *G.* should receive 20 per cent. of the amount of the allotted capital of the company. By a second agreement between *P.*, the agent of the vendors, and *D.* (a nominee of *G.*), described as agent of the intended company, *P.* agreed to sell the mine to the company for the price mentioned in the former agreement, but no reference was made to the percentage which *G.* was to receive. Shortly afterwards the company was formed; the memorandum of association and prospectus, which were settled by *G.*, stated that its object was to carry out the second agreement and for the purchase and working of the mine, but they contained no reference to the first agreement, under which *G.* received the amount therein agreed upon. *G.* secured the services of the first directors, provided their qualifications, and launched the company. In an action by the company to make him liable for what he had received without the knowledge of the company:—*Held,* that *G.* was liable for the amount of the secret profit which he had made; also, that in estimating the amount of such profit he was entitled to be allowed all sums *bonâ fide* expended in securing the services of the directors and providing their qualification, and in payments to the brokers and officers of the company and to the public press in relation to the company. Emma Silver Mining Company *v.* Grant - 918

2. —— *Mortgage Bond—Principal and Interest payable to "Bearer"—Bond Trust Deed—Covenant by Company to pay Trustees—Unpaid Interest—Winding-up Petition by Bondholder—Creditor—Right to Winding-up Order—Regarding wishes of Creditors—Companies Act,* 1862, *s.* 91.] A limited railway company issued, under the provisions of a trust deed, £100 "mortgage bonds," in order to raise money for the construction of their railway. By the deed the company covenanted with the trustees that all the bonds should rank *pari passu,* and that every bond should entitle the holder to a fully paid-up ordinary share in the company as a "bonus share;" that the company would pay to the trustees the interest on the bonds, and also an annual sum by way of sinking fund for the discharge of the bonds; and that the bond debt, interest, and sinking fund should be a charge on the railway. Each bond contained a covenant by the company with the trustees for payment of £100 to the "bearer thereof," and of interest to the "bearer" of the coupons annexed thereto.—The interest on the bond debt having fallen into arrear, a winding-up petition was presented by a holder of six bonds, but was dismissed with costs, on the ground, 1, that neither the bearer of the bond, as to principal, nor the bearer of the coupons, as to interest, was a creditor of the company either at law or in equity within the meaning of the Companies Acts, his right of action being through the trustees only; and, 2, that assuming a bondholder to be a creditor, then, under sect. 91 of the *Companies Act,* 1862, regard must be had to the wishes of the bondholders other than the petitioner, all of whom opposed the petition.—As a general rule, an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ;* but that rule is subject to exceptions: *e.g.*, where all the other creditors oppose the petition, and it appears that the petitioning creditor will not be in a better position by obtaining a winding-up order. *In re* Uruguay Central and Hygueritas Railway Company of Monte Video - - - 372

3. —— *Mortgage to Director, Registration of—Mortgage to Partners, one of whom is a Director—Practice—Binding Character of previous Decisions.*] The firm of *T. S. & Co.*, consisting of three partners, of whom *T. S.* was the managing

COMPANY—*continued.*

partner, advanced a sum of money to the *D. Company, Limited*, of which *T. S.* was one of the directors, the company accepting a bill of exchange drawn on them by *T. S. & Co.* This bill was subsequently renewed in the name of *T. S.* alone, but it was known to the company that the debt remained a debt due to the firm. When the renewed bill became due the company deposited with *T. S.* certain iron as a security, which he held on behalf of his firm, The register of mortgages kept by the company contained no notice of this transaction. The company having afterwards been ordered to be wound up, the liquidator claimed to have the iron delivered to him, on the ground that as *T. S.* was a director the security was bad for want of registration, as in *In re Native Iron Ore Company* (2 Ch. D. 345):—*Held* by *Hall*, V.C., and on appeal by *Jessel*, M.R., and *Bramwell*, L.J. (*dissentiente Baggallay*, LJ.), that the rule in *In re Native Iron Ore Company* did not apply to a case where the mortgage was made to partners who were not all directors of the company.—Consideration of the circumstances under which a Court may overrule previous decisions of the same Court. *In re* South Durham Iron Company. Smith's Case - C. A. 579

4. —— *Suit by Shareholder on behalf of all the other Shareholders—Suit in Name of Company.*] Two shareholders in a company commenced an action against *H.*, the managing director of the company, and two other directors, and the company, for the purpose, *inter alia*, of setting aside for fraud a sale by *H.* to the promoters which was adopted by the company. The statement of claim alleged that *H.* and the other two directors who were Defendants formed a majority of the board, and that the two were under the control of *H.* and refused to take any steps with reference to the acts complained of, and that *H.* possessed such a preponderance of votes that no steps could be taken within the company to remedy those acts. *H.* demurred, on the ground that the frame of the action was improper, as it ought to have been brought in the name of the company. The demurrer was allowed by Vice-Chancellor *Malins*, with liberty to amend by adding the company as a Plaintiff:—*Held*, on appeal, that the acts complained of being acts which a majority could not sanction so as to bind the minority, and there being allegations shewing that it was impossible to get the company to impeach those acts, a demurrer on the ground that the company ought to have been Plaintiff could not be sustained.—*Duckett* v. *Gover* (6 Ch. D. 82) explained. Mason *v.* Harris - - - - C. A. 97

5. —— *Transfer of Shares—Registration—Articles of Association — Companies Act*, 1862, *Table A, Arts.* 10, 13.] The 10th clause of Table A of the schedule to the *Companies Act*, 1862, does not apply to persons claiming shares by transmission under the 13th clause. Therefore, where a company has adopted Table A as its articles of association, it cannot refuse to register the name of a trustee in bankruptcy of a shareholder on the ground that the shareholder is indebted to the company.—Decision of *Hall*, V.C., reversed. *In re* Bentham Mills Spinning Company - - - - C. A. 900

COMPANY—*continued.*

6. —— *Voluntary Winding-up—Dissolution of Company—Companies Act*, 1862, *ss.* 142, 143.] The Court has no jurisdiction to make an order for winding up a company which has been voluntarily wound up and dissolved under the 142nd and 143rd sections of the *Companies Act*, 1862, unless the dissolution can be impeached on the ground of fraud. *In re* London and Caledonian Marine Insurance Company - - C. A. 140

7. —— *Voluntary Winding-up—Voting—Show of Hands—Poll.*] The articles of a company provided that at any general meeting, unless a poll was demanded by at least two members, a declaration by the chairman that a resolution was carried, and an entry to that effect in the minute book, should be sufficient evidence of the fact; that if a poll was demanded it should be taken in such manner as the chairman should direct; that at any general meeting the chairman should be entitled to a second or casting vote; and that every member should have one vote for every share. At a meeting at which five members were present an extraordinary resolution to wind up the company was passed. *K.* was then proposed as liquidator, and an amendment was moved that *M.* should be appointed. Three of the five persons present voted for *M.*, the other two, holding a greater number of shares than the three, voted for *K.* A poll was not demanded:—*Held*, by *Bacon*, V.C., that *K.* was duly elected.—*Held*, on appeal, that a poll not having been demanded, the voting was to be by show of hands, without counting shares, and that *M.*, therefore, was duly elected. *In re* Horbury Bridge Coal, Iron, and Waggon Company - - C. A. 109

8. —— *Winding-up—Affidavit by Managing Director in Opposition to Petition—Short Notice by Petitioner's Solicitor to inspect Company's Books—Rules of Court*, 1875, *Order* xxxi., *rr.* 14, 15, *et seq.—Register of Mortgages — Companies Act*, 1862, *s.* 43.] In opposition to a petition presented by a shareholder, whose shares were fully paid up, for a compulsory winding-up order, the managing director filed an affidavit, in which he stated what were the liabilities and assets of the company as shewn by the company's books.—The solicitor of the Petitioner gave notice in writing to the solicitor of the company that he would attend at the company's office upon the morrow morning to inspect the books which had been referred to, and on his attending in pursuance of the notice given the previous afternoon, the secretary of the company refused inspection of the books and also of the register of mortgages.—Upon motion, *held*, that the refusal to allow the solicitor to inspect was a refusal to the Petitioner; that as regarded the register of mortgages, the Petitioner, his solicitor or agent, was under sect. 43 of the *Companies Act*, 1862, entitled to inspect it; and that as regarded the company's books, the notices required by Rules of Court, 1875, Order xxxi., rules 14, 15, *et seq.*, had not been given, and therefore there would be no order to inspect. *In re* Credit Company - - - - 256

9. —— *Winding-up — Contribution — Past Members—Companies Act*, 1862, *s.* 38, *sub-s.* 3.] By resolutions and arrangements which had been

COMPANY—*continued.*

declared to be *intra vires* by the Court of Appeal (See *Bath's Case*, 8 Ch. D. 334) a life assurance society extended its business to fire policies. Separate (B) shares were issued in respect of the fire department, which was kept as a distinct business with separate books from the life department; and by the fire policies it was provided that all claims in respect thereof should be paid out of such of the capital, stock, and funds as were expressly applicable to the fire insurance department.—A call having been made for the purpose of meeting claims in respect of the fire business:—*Held*, that the contributions of the existing B (fire policy) shareholders having been exhausted, past members of the B class were liable to contribute without calling on the A (life policy) shareholders whose liability in respect of fire claims had been expressly excluded under the arrangement which had been already treated as valid by the Court of Appeal. *In re* Norwich Provident Insurance Society. Bath's Case [386

10. —— *Winding-up Petition—Fully paid-up Shareholder.*] A fully paid-up shareholder who presents a petition to wind up the company must both allege in his petition and shew by evidence that there are assets of the company of such an amount that in the event of a winding-up he would have a tangible share of surplus to receive. —On a winding-up petition, as well as in an action, a vague allegation of fraud is not sufficient, but the facts which constitute the fraud must be stated, and if there is only a vague general allegation of fraud, evidence of the acts of fraud is not admissible.—Whether a winding-up petition by a fully paid-up shareholder can be maintained where the company has no assets except moneys to be recovered by rescinding fraudulent transactions properly alleged in the petition, *quære*. *In re* Rica Gold Washing Company - C. A. 36

11. —— *Winding-up — Judgment Creditor — Stay of Execution—Companies Act*, 1862, *ss.* 85, 163—*Bankruptcy Act*, 1869, *s.* 87—*Judicature Act*, 1875, *s.* 10.] A creditor of a company obtained judgment on the 4th of November, 1878, but delayed issuing execution on the representation of the company that they would pay, and did not intend to present a winding-up petition.—On the 28th of November the company presented a winding-up petition, and subsequently an arrangement was made by the company with the statutory majority of creditors, under the *Joint Stock Companies Arrangement Act*, 1870, for a composition, subject to the obtaining the sanction of the Court required by that Act.—The judgment creditor dissented from the arrangement, and moved for liberty to issue execution notwithstanding the petition and arrangement.—The Court declined to sanction the arrangement, and gave leave to the judgment creditor to issue execution.—Sect. 87 of the *Bankruptcy Act*, 1869, which deprives execution creditors, where the sheriff has notice of a bankruptcy within fourteen days, of the fruits of their execution, is not applied to the winding-up of companies by the *Judicature Act*, 1875, s. 10.—*In re Printing and Numerical Registering Company* (8 Ch. D. 535) not followed. *In re* Richards & Co. - - - - 676

COMPANY—*continued.*

12. —— *Winding-up—Petition by Shareholder for Compulsory Winding-up after Resolution for Voluntary Winding-up—Companies Act*, 1862, *s.* 145—*Division of unallotted Shares among Shareholders without Consideration — Reduction of Capital—Companies Act*, 1867, *ss.* 9, 25.] After a resolution has been passed for winding up a company voluntarily a shareholder cannot, as a general rule, obtain a compulsory order for winding up, or an order for continuing the voluntary winding-up under supervision. The only exceptions to the rule are where the resolution has been passed fraudulently, or where creditors appear to support the petition.—By the articles of association of a limited company the directors were authorized, when it should appear to them that the capital for the time being subscribed was sufficient for the purposes of the company, to allot the remaining unallotted shares among the shareholders in proportion to the number of shares then held by them, without receiving any money for them.—When shares to the amount of one-fourth of the nominal capital had been allotted and paid up, the directors allotted the remaining three-fourths, as fully paid up shares, among the existing shareholders without further consideration; and the Petitioner became a purchaser of some of the shares in the market. The company passed a resolution for a voluntary winding-up, and afterwards the Petitioner presented a petition for a compulsory winding-up:—*Held*, that the provision in the articles was highly improper; but that if it amounted to a fraud it was a fraud upon the Petitioner in his individual capacity of purchaser of the shares, and was not committed by or upon the company, and, therefore, it was not within the scope of the Winding-up Acts to give relief in respect thereof. The petition for winding up was accordingly dismissed. — The decision of *Malins*, V.C., reversed. *In re* Gold Company - - - - C. A. 701

13. —— *Winding-up—Rules in Bankruptcy—Reputed Ownership—Judicature Act*, 1875, *s.* 10.] The bankruptcy rules as to reputed ownership are not to be applied under sect. 10 of the *Judicature Act*, 1875, in the winding-up of a limited company. *In re* Crumlin Viaduct Works Company - - - - - - 755

14. —— *Winding-up — Secured Creditor — Garnishee Order Nisi—Bankruptcy Act*, 1869, *s.* 12 — *Judicature Act*, 1875, *s.* 10.] A judgment creditor who has obtained a garnishee order *nisi* to attach debts due to his debtor does not obtain any charge on the debts until service of the order *nisi* on the garnishees. Therefore, where a judgment creditor of a company obtained a garnishee order against a debtor of the company and before the order *nisi* was served, a petition was presented to wind up the company on which an order was afterwards made, it was *held* (reversing the decision of *Fry*, J.), that the creditor was not a secured creditor at the time of the commencement of the winding-up. *In re* Stanhope Silkstone Collieries Company - - - C. A. 160

15. —— *Winding-up—Scheme of Arrangement —Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 136, 159, 160—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.] If a

COMPANY—*continued.*
scheme of arrangement under the *Companies Act*, 1862, and the *Joint Stock Companies Arrangement Act*, 1870, has received the sanction of the majorities of contributories and creditors required by the Acts, and also the sanction of the Court, it is not material in what order these sanctions have been obtained.—When the arrangement is a fair one, and is likely to be beneficial to all parties, the Court will not be astute to find technical defects in the proceedings. *In re* Dynevor, Dyffryn, and Neath Abbey Collieries Company C. A. 605

COMPENSATION—Public Health Acts - 838
See Public Health Acts.

CONCEALMENT—Policy of insurance - 363
See Insurance.

CONSENT—Enlargement of time - - 759
See Practice. 7.

—— Order by - - - - - 763
See Practice. 24.

CONSIDERATION—Assignment of all debtor's property - - - - 539
See Bankruptcy. 1.

CONSOLIDATION OF MORTGAGES - 1
See Mortgage. 3.

CONSTRUCTIVE DELIVERY - 68, 560
See Sale of Goods. 1, 2.

CONTEMPT — Attachment — Service of untrue copy of order - - - 168
See Practice. 9.

CONTINGENT LIABILITY—Proof in bankruptcy
See Bankruptcy. 10. [914

CONTRACT—Illegality - - - 170
See Illegality.

CONTRIBUTORY - - - 278, 386
See Company. 8, 9.

CONVERSION - - - - - 640
See Settlement. 3.

—— - - - - - - 341
See Administration.

CONVEYANCE—Exception in - - 968
See Way. 2.

COPY OF ORDER—Service—Untrue copy - 168
See Practice. 8.

CORPORATION—Treasurer of friendly society
See Friendly Society. [768

CORPUS OR INCOME—Annuity - - 891
See Will. 2.

COSTS—Abandoned appeal - - 118, 913
See Practice. 2, 9.

—— Apportionment—Counter-claim - 416
See Practice. 10.

—— Breach of covenant for quiet enjoyment 82
See Damages.

—— Counsel's fees - - - - 206
See Practice. 12.

—— Defendant whose interest has ceased 436
See Practice. 1.

—— Partnership action - - - 942
See Practice. 11.

—— Proof in bankruptcy—Valuation of security
See Bankruptcy. 14. [62

—— Security for—Appeal - - - 741
See Practice. 5.

COUNTER-CLAIM—Costs - - - 416
See Practice. 10.

COVENANT—*Injunction — "Assign"—Lessee of Covenantee.*] Where there are mutual covenants by owners of land, their heirs and assigns, with the owners of adjoining land, their heirs and assigns, to comply with certain stipulations, the subsequent lessee of one of the owners is entitled to the benefit of the covenants as an assign, and can sue to restrain a breach. Taite *v.* Gosling [273

2. —— *Perpetuity—Covenant to give unlimited Right of Pre-emption of Land.*] In a conveyance of a plot of land (reserving the mines under it to the vendor) there was a covenant by the vendor with the purchaser that, in case the vendor, his heirs or assigns, should at any time thereafter sell, or agree to sell, to any person the mines under some adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot of land, his heirs or assigns, the mines under that plot, and give him and them the refusal of the same for one month from the time such offer should be made, at the same price per acre as the vendor, his heirs or assigns, should have agreed to sell the adjoining mines. And, if the purchaser, his heirs or assigns, should accept such offer, and within such month agree to purchase the mines so offered, at the price at which they should be offered, the vendor, his heirs or assigns, should convey the same to the purchaser, his heirs or assigns:—*Held*, that this covenant was not obnoxious to the rule against perpetuities.—*Gilbertson* v. *Richards* (4 H. & N. 277; 5 H. & N. 453) followed.—*Held*, also, that the performance of the covenant could be enforced by assigns of the purchaser against devisees of the vendor:—*Held*, also, that it was necessary that the offer should be made in writing, and that consequently the non-acceptance within a month of a parol offer made by the devisees of the vendor did not deprive the assigns of the purchaser of their rights under the covenant.—And specific performance of the covenant was decreed against the devisees of the vendor and a purchaser from them (with notice of the covenant) of the adjoining land and the mines under it, and also of the mines under the plot of land, to whom they had actually executed a conveyance. Birmingham Canal Company *v.* Cartwright - - 421

3. —— *Restrictive Covenant — Covenantee, Assign of—Right to sue.*] The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the Defendant's predecessors in title, who entered into covenants with the vendors, their heirs and assigns, restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the Plaintiff's predecessors in title. The conveyance contained no reference to the restrictive covenants, nor was there any contract or representation that the purchasers were to have the benefit of them:—*Held* (affirming the decision of *Hall*, V.C.), that the Plaintiffs were not entitled to restrain the Defendants from building in contravention of the restrictive covenants entered into by their predecessors in title. Renals *v.* Cowlishaw - - - - - C. A. 866

COVENANT—*continued.*
—— For quiet enjoyment—Measure of damages *See* DAMAGES. [82
—— Separation deed—Custody of child - 508 *See* INFANT. 1.
—— To pay annuity—Proof in bankruptcy 914 *See* BANKRUPTCY. 10.
—— To settle after-acquired property - 745 *See* SETTLEMENT. 2.
CREDITOR—Secured—Bankruptcy 62, 220, 691 *See* BANKRUPTCY. 12, 13, 14.
—— Winding-up of company—Wishes of creditors - - - - 372 *See* COMPANY. 2.
CROPS—Growing—Bills of Sale Act—Registration - - - - - 539 *See* BILLS OF SALE ACT.
CROSS NOTICE OF APPEAL - 1, 539, 873 *See* PRACTICE. 3, 4, 27.
CUSTODY OF INFANT - - - 508 *See* INFANT. 1.

DAMAGES—*Measure of Damages—Covenant for Quiet Enjoyment—Breach by Lessor—Costs of defending Action by rightful Claimant.*] The Plaintiff, a lessee of land, brought an action against the lessor and against other lessees who claimed a right of way over the Plaintiff's land under a grant from the same lessor, denying the right and claiming an injunction against the lessees; or, if the Court should hold that they had a right of way, then damages from the lessor under his covenant for quiet enjoyment.—At the trial the other lessees established their right of way, and judgment was given against the lessor for damages for the loss sustained by the Plaintiff by reason of the exercise of the right of way:—*Held*, that the measure of damages payable by the lessor was not the permanent injury to the land, but only the damage sustained at the commencement of the action:—But *held*, also, that the lessor, being the cause of the whole litigation, must pay the costs of the Plaintiff and the other lessees.—The judgment of *Fry*, J., varied. CHILD *v.* STENNING [C. A. 82

DEBENTURE—Holder of—Petition for winding up - - - - - 372 *See* COMPANY. 2.
DEBT—Assignment of - - - 198 *See* ASSIGNMENT OF DEBT.
—— Extinguishment of—Wife of debtor executrix of creditor - - - - 163 *See* HUSBAND AND WIFE. 4.
—— Married woman—Charge on separate estate *See* HUSBAND AND WIFE. 4. [687
DEBTOR'S SUMMONS - - - 298, 303 *See* BANKRUPTCY. 2, 3.
DEDICATION OF ROAD - - - 327 *See* WAY. 1.
DEEDS—Deposit of - - - - 398 *See* MORTGAGE. 1.
DEFENCE—Delivery of - - - 759 *See* PRACTICE. 7.
DELIVERY OF GOODS—Constructive delivery *See* SALE OF GOODS. 1, 2. [68, 560
DEPOSIT OF DEEDS - - - 398 *See* MORTGAGE. 1.
DIARY—Solicitor—Duty to keep - - 525 *See* SOLICITOR. 1.
DIRECTOR—Mortgage to—Registration - 579 *See* COMPANY. 3.
DISCLAIMER—Trustee in bankruptcy 572, 908 *See* BANKRUPTCY. 4, 5.
DISCONTINUANCE—Part of action - 918 *See* PRACTICE. 31.
DISMISSAL FOR WANT OF PROSECUTION 759 *See* PRACTICE. 7.
DISSOLUTION OF COMPANY - - 140 *See* COMPANY. 6.
DOCUMENTS—Production of - - 323 *See* PRACTICE. 25.
DOUBLE PROOF—Bankruptcy - - 317 *See* BANKRUPTCY. 11.

EASEMENT—Noise—Prescription - 852 *See* NOISE.
ELECTION—To take property in its actual state *See* ADMINISTRATION. 2. [341
—— Married woman—Sale in partition action—Proceeds paid to husband - 652 *See* PARTITION. 3.
ENLARGEMENT OF TIME—Practice 759, 905 *See* PRACTICE. 7, 23.
EQUITY TO A SETTLEMENT - - 779 *See* HUSBAND AND WIFE. 2.

ESTOPPEL—*Practice—Verdict on Issues in Suit between Predecessors of Parties.*] The verdict on issues in a suit between predecessors in title does not in itself create an estoppel. The decree and the pleadings must be taken into consideration. ROBINSON *v.* DULEEP SINGH - - - 798

—— Recital of void mortgage - - - 1 *See* FRAUDULENT CONVEYANCE.
EVIDENCE—Documents—Marking by Registrar *See* PRACTICE. 32. [150
EXAMINATION—Married woman—Money paid to husband - - - - 652 *See* PARTITION. 3.
EXCLUSIVE POWER - - - 959 *See* POWER.
EXECUTOR—Debtor and creditor—Extinguishment of debt - - - 163 *See* HUSBAND AND WIFE. 4.
EXPULSION—Member of club - - 353 *See* CLUB.

FOLD-COURSE - - - - - 798 *See* COMMON.
FORECLOSURE—Equitable mortgage - 205 *See* PRACTICE. 16.
—— Interlocutory—Application for sale - 204 *See* PRACTICE. 17.
—— One of several mortgagees - - 121 *See* PRACTICE. 18.
FOREIGN ATTACHMENT—Proof in bankruptcy *See* BANKRUPTCY. 12. [220

FOREIGN BANKRUPTCY—Bankruptcy in two countries - - - - 317
See Bankruptcy. 11.

FOREIGN CHARACTERS—Trade-mark - 250
See Trade-mark. 1.

FOREIGNER—Temporary residence in *England* —Absconding debtor—Arrest - 298
See Bankruptcy. 2.

FORFEITURE CLAUSE—Change of religion 959
See Power.

FRAUD—Mortgage—Deposit of deeds—Solicitor
See Mortgage. 1. [398

—— Mortgage—Expectant heir - - 227
See Mortgage. 2.

FRAUDULENT CONVEYANCE—27 *Eliz. c.* 4—*Mortgage executed without Agreement and without Knowledge of Mortgagee—Recital—Estoppel.*] A mortgage executed in 1871 contained a recital that the mortgagor was indebted to the mortgagee in the sum of £1500 for moneys advanced by her to him, and that he had agreed to secure the payment of the same by the mortgage. The money had been advanced in 1864, and the evidence shewed that there was at that time no agreement for a mortgage, and that there had been no subsequent pressure by the lender. The mortgage deed was retained in the possession of the mortgagor, and there was nothing to shew that the mortgagee knew of its execution until February, 1874:—*Held*, by *Fry*, J., and by the Court of Appeal, that the mortgage was void under 27 Eliz. c. 4, as against a mortgagee for value whose mortgage was executed in February, 1872, the recital of the agreement not operating as an estoppel against him.—*Exton* v. *Scott* (6 Sim. 31) explained. Cracknall *v.* Janson - - C. A. 1

FRAUDULENT PREFERENCE - - 306
See Bankruptcy. 6.

FREIGHT—Lien for - - - - 68
See Sale of Goods. 1.

FRIENDLY SOCIETY—*Treasurer—Corporation*—38 & 39 *Vict. c.* 60, *s.* 15, *sub-s.* 7.] An incorporated banking company cannot be the treasurer of a friendly society within the meaning of the *Friendly Societies Act*, 1875. *In re* West of England and South Wales District Bank. *Ex parte* Swansea Friendly Society - 768

GARNISHEE ORDER—Proof in winding-up—Secured creditors - - - 160
See Company. 14.

—— Service of—Charge on property - 942
See Practice. 11.

GRAVEL PITS—Right to dig—Lord of manor
See Common. [798

HEIR—Mortgage of reversion - - 227
See Mortgage. 2.

HIGHWAY—*Trees overhanging Highway—Order of Justices on Occupier of Adjacent Lands—Owner or Occupier—Highways Act* (5 & 6 *Will.* 4, *c.* 50), *s.* 65.] The word "owner" in sect. 65 of the *Highways Act* (5 & 6 Will. 4, c. 50), means the person in actual occupation.—An order of justices under sect. 65 for lopping trees overhanging a highway made on a summons served only on the occupying tenant of the land abutting on the highway:—*Held* to be valid, and in form sufficient. Woodard *v.* Billericay Highway Board [214

—— Contract with vestry to dedicate road to public - - - - 327
See Way. 1.

HOUSE OF LORDS—Decree of—How made order of Chancery Division - - 448
See Practice. 15.

HUSBAND AND WIFE—*Chose in Action of Wife—Reduction into Possession—Receipt by Agent of Husband and Wife.*] The receipt by an agent, appointed by husband and wife, of money forming part of the estate of an intestate of which the wife is administratrix, amounts to a reduction into possession by the husband of the wife's distributive share of the money.—*Huntley* v. *Griffith* (F. Moore, 452; Goldsborough, 159) followed. *In re* Barber. Dardier *v.* Chapman - 442

2. —— *Equity to a Settlement—Life Interest—Amount to be settled.*] A married woman has the same equity to a settlement, as against her husband or his general assignee, out of property in which she has only a life interest, as out of property in which she has an absolute interest; and the Court will make no distinction between the two cases as regards the amount to be settled. In every case the Court will exercise its judicial discretion as to the amount to be settled, having regard to all the circumstances.—A husband became insolvent in 1861 to a large amount, and his estate paid no dividend. In 1876 his wife became entitled to the income of property amounting to £500 a year.—The Court (affirming the decision of *Malins*, V.C.), ordered the whole income to be settled on the wife. Taunton *v.* Morris C. A. 779

3. —— *Separate Estate—Action for Debt contracted as Feme Sole—Trustee not a Party—Form of Order.*] An action was brought against a married woman for a debt contracted with a creditor who believed her to be a *feme sole*. She pleaded coverture, and the husband was then made a party. It was alleged that she had separate estate. At the trial it was declared that her separate estate was chargeable with payment of the debt and costs, and an inquiry was directed to ascertain of what her separate estate consisted and in whom it was vested. In answer to the inquiry the Master certified that the separate property consisted of an annuity, secured by the covenant of the husband contained in a separation deed and vested in a trustee. On a summons by the Plaintiff to shew cause why he should not be at liberty to sign judgment, and the trustee not being a party:—*Held*, that the Court could only make an order declaring the debt (with interest), and the taxed costs of the Plaintiff, to be a charge upon the annuity, but without prejudice to any claim by the trustee. Collett *v.* Dickenson 687

4. —— *Wife of Debtor, Executrix and Residuary Legatee of Creditor—Extinguishment of Debt.*] Mrs. *W.* made her daughter, Mrs. *P.*, her sole executrix and universal legatee. At the death of Mrs. *W.* her son-in-law, *P.*, was indebted to her on a bond conditioned for payment of a sum

HUSBAND AND WIFE—*continued.*
of money by yearly instalments, some of which did not become due till after her death; but others which became due before her death remained unpaid. Mrs. *P.* proved the will, and about twelve months after her mother's death passed the residuary account, shewing that the debts were all paid. *P.* took the bond into his possession and kept it till his death, which took place more than six months after passing the account, and applied to his own use all the other personal estate of Mrs. *W.* After the death of *P.*, a decree having been made for administration of his estate, Mrs. *P.*, as executrix of her mother, sought to prove as a creditor on the bond:—*Held* (reversing the decision of *Hall*, V.C.), that as the debts of Mrs. *W.* had been paid, and the residue had become a clear fund in the lifetime of *P.*, the liability of *P.* on the bond was extinguished, and the proof could not be allowed. *In re* Price. Price *v.* Price - - - - - - C. A. 163

—— Custody of child—Covenant in separation deed - - - - - 508
See Infant. 1.

—— Marriage settlement - 640, 645, 745
See Settlement. 2, 3, 4.

—— Sale of real estate—Partition action—Share of married woman - - - 652
See Partition. 3.

ILLEGALITY—*Contract—Action for Breach of—Trustee and Cestui que Trust—Breach of Trust—"Government Securities Trust"—Association of more than Twenty Persons for Gain—Non-registration — Companies Act*, 1862, *s.* 4 — *Dividing Trust Funds by Annual Drawings — Lottery — Lottery Acts.*] No Court of Law or Equity will lend its assistance in any way towards carrying out an illegal contract; therefore such a contract cannot be enforced by one party to it against the other, either directly, by asking the Court to carry it into effect, or indirectly, by claiming damages or compensation for breach of it: though there may be some cases in which a party to such a contract may recover from a third person money paid over to that person in pursuance of the contract; and other cases in which a person may recover from the parties to such a contract moneys obtained by them from him on the representation that the contract was legal.—A "Government securities trust," or combination of more than twenty persons, formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits among themselves by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest, with a bonus, is an "association for the acquisition of gain" within the meaning of sect. 4 of the *Companies Act*, 1862, and is, therefore, unless registered under that section, an illegal association.—*Semble*, the mode of distribution was a lottery, and therefore illegal under the Lottery Acts.—A member of such an association, which had never been registered under the *Companies Act*, 1862, but which was regulated by a trust deed, brought an action against the trustees named in the deed to have the trust administered by the Court, and to make the trustees

ILLEGALITY—*continued.*
liable for alleged breaches of trust whereby part of the trust fund had been lost. A demurrer by one of the Defendants, a retired trustee, was allowed, on the ground that the association was illegal, and that the trust deed therefore constituted an illegal contract which the Court would not enforce. —*Sharp* v. *Taylor* (2 Ph. 801) discussed. Sykes *v.* Beadon - - - - - 170

IMPLICATION—Gift by—Life estate - 873
See Will. 3.

INCLOSURE—Common of manor—Right of lord
See Common. [798

INCOME—Charge on—Annuity - - 891
See Will. 2.

—— Gift of, for maintenance - - 406
See Will. 6.

—— Maintenance out of—Infant - - 272
See Infant. 2.

INDEMNITY—Mortgage deed—Fraudulent deposit by solicitors - - - 398
See Mortgage. 1.

INFANT—*Custody*—36 & 37 *Vict. c.* 12, *s.* 2—*Covenant in Separation Deed—Father's Rights—Ward of Court—Religious Education—Misconduct of Mother—Atheism.*] By a covenant in a separation deed executed after the passing of the *Infants' Custody Act*, 1873, a father agreed that his infant daughter should remain in her mother's custody during eleven months in each year. The mother held and promulgated atheistical opinions, and refused to allow the child to receive any religious instruction. She also published and circulated an obscene book. The child was made a ward of Court, being then about eight years old:—*Held*, that, to bring up the child in the religion of her father was a duty which the Court owed to its ward, and was unaffected by the covenant in the separation deed; and also that the refusal of religious instruction to the child and the publication of the obscene book were in themselves sufficient grounds for removing her from the custody of the mother.—The decision of *Jessel*, M.R., affirmed. *In re* Besant - C. A. 508

2. —— *Maintenance — Discretion — Income.*] Where a fund was by will given to trustees for infants, and the trustees were desired to pay the income to the mother to be by her applied for their benefit at her discretion:—*Held*, that the Court had power, where the mother had not exercised a sound discretion, to order the income to be paid to the father for the maintenance of the infants. *In re* Roper's Trusts - - 272

INJUNCTION—Bankruptcy - - - 278
See Bankruptcy. 8.

—— Expulsion of member of club - 353
See Club.

—— Interpleader—Sale by sheriff - - 24
See Practice. 19.

—— Right of way - - - - 146
See Practice. 13.

—— Staying proceedings - - - 576
See Practice. 6.

INSOLVENCY—*Deceased Insolvent Debtor—Property acquired after Final Order—Vested Reversion falling into Possession after Death of Insolvent*

INSOLVENCY—*continued.*

—*Rights of Official Assignee and of Unsatisfied Creditors*—5 & 6 *Vict. c.* 116, *ss.* 7, 9, 12—7 & 8 *Vict. c.* 96, *ss.* 4, 8, 10, 73—*Bankruptcy Repeal Act*, 1869 (32 & 33 *Vict. c.* 83), *s.* 15.] Sect. 9 of the Act 5 & 6 Vict. c. 116, applies only to a living insolvent, and does not enable the assignee of a deceased insolvent to obtain possession of property which, though it becomes vested in the insolvent in reversion expectant on a life estate after his final order, does not fall into possession until after his death.—In such a case the proper remedy of the unsatisfied creditors under the insolvency is to commence an action for the administration of his estate. *Ex parte* WELCHMAN. *In re* HARE [C. A. 48

INSPECTION OF BOOKS—Company - 256
See COMPANY. 8.

INSURANCE—*Proposal for Policy on Life—Concealment.*] In a proposal by *M.* to an assurance office for an assurance on his life, in answer to the question, "Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" his answer was, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." The proposal was accepted, but the office having subsequently ascertained that the life of *M.* had been declined by several offices:—*Held*, that there had been a material concealment, and that the office was entitled to have the contract set aside. LONDON ASSURANCE *v.* MANSEL - 363

INTEREST—Mortgage by expectant heir - 227
See MORTGAGE. 2.

INTERPLEADER—Injunction to restrain sheriff
See PRACTICE. 19. [24

INTERROGATORIES - - - 439
See PRACTICE. 20.

IRISH RAILWAY STOCK—Transfer into Court
See TRUSTEE ACTS. [888

ISSUE—Between co-Defendants - 392, 394, n.
See PRACTICE. 21, 22.

ISSUES OF FACT—Trial by jury - - 240
See PRACTICE. 30.

JOINDER OF CAUSES OF ACTION - 905
See PRACTICE. 23.

JOINT TENANT—*Gift to Sisters as Joint Tenants—Agreement to dispose of Property by Wills—Severance of Joint Tenancy.*] Leasehold property was given by will to two sisters as joint tenants, and they mutually agreed to bequeath it in trust for each other for life, and for their nieces after the death of the survivor. One sister having died, the survivor made a will giving the property in a different manner:—*Held*, that the agreement between the sisters, carried out by the making of the wills, severed the joint tenancy, and that the property must be administered on the footing of a tenancy in common. *In re* WILFORD'S ESTATE. TAYLOR *v.* TAYLOR - - - - 267

JOINTURE - - - - - 640
See SETTLEMENT. 3.

JUDGMENT CREDITOR—Bankruptcy—Secured creditor - - - - 691
See BANKRUPTCY. 13.

JUDGMENT CREDITOR—*continued.*

—— Company—Scheme of arrangement - 676
See COMPANY. 11.

JURISDICTION—Administration action—Scotch domicil—Decree for general administration - - - - - 522
See ADMINISTRATION. 3.

—— Bankruptcy - - - 148, 278, 525
See BANKRUPTCY. 7, 8, 9.

—— Winding-up of company - - 140
See COMPANY. 6.

LANDLORD AND TENANT—*Specific Performance—Lease—Agreement to underlet—Agreement to let the Tenant have a Lease at any Period he may feel disposed; and "not to molest or disturb or raise the Rent of" the Tenant after his having laid out Money in Improvements.*] *G. S.*, a lessee of a house for a term of eighty years, which had fifty-nine years to run, agreed to let the same to *R. K.* at a fixed rent. The duration of the underlease was not specified; but the agreement went on to say that *G. S.* agreed to let *R. K.* have a lease at the same rent "at any period he may feel disposed;" and further agreed "not to molest, disturb, or raise the rent of" *R. K.* "after his having laid out money in improving the said premises." *R. K.* did not at the time of the agreement know the nature of the interest of *G. S.* in the property.—*R. K.* having gone into and remained in possession, and having laid out money in improving the premises, and the lease having over twenty years to run:—*Held*, by *Bacon*, V.C., that *R. K.* was entitled to an underlease for the whole of the residue of the term, less one day.—*Held*, on appeal, by *Jessel*, M.R., and *Bramwell*, L.J. (*dubitante Baggallay*, L.J.), that he was entitled only to an underlease for the residue of the term, less one day, if he should so long live. KUSEL *v.* WATSON - - - C. A. 129

LAPSE—Void legacy - - - - 949
See CHARITY.

LEASE - - - - - - 129
See LANDLORD AND TENANT.

—— Disclaimer - - - - 908
See BANKRUPTCY. 4.

LEGAL PERSONAL REPRESENTATIVE—Appointment by the Court - - 419
See PRACTICE. 14.

LIEN—Freight - - - - 68
See SALE OF GOODS. 1.

LIFE ESTATE—Cesser of—Forfeiture clause 959
See POWER.

—— Equity to a settlement - - - 779
See HUSBAND AND WIFE. 2.

—— Gift by implication - - - 873
See WILL. 3.

LIGHT AND AIR—*Constructive Notice—Agreement.*] Disputes having arisen between the Plaintiff and *W.* whether a window in the Plaintiff's house overlooking *W.'s* land was an ancient light, an agreement, not under seal, was signed by which *W.* agreed that the Plaintiff should have access of light to the window, and the Plaintiff agreed to keep the window opaque and make it open only in such a way that no person could look out of it. *W.'s* land was afterwards sold to

LIGHT AND AIR—*continued.*
the Defendant, who had no actual notice of the agreement, but knew of the existence of the window:—*Held*, by *Hall*, V.C., that the Defendant, seeing the window when he purchased, was put upon inquiry, and was affected with constructive notice of the agreement, and therefore must be restrained from interfering with the access of light to the window.—*Held*, on appeal, that the mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them.—The *dicta* of Lord *Chelmsford* in *Miles* v. *Tobin* (16 W. R. 465) dissented from. ALLEN *v.* SECKHAM C. A. 790

LIMITATIONS, STATUTE OF—*Mortgage—Trust for Sale—Sale under Trust—Surplus Moneys—Mortgagee in Possession*—3 & 4 *Will* 4, *c.* 27, *ss.* 25, 28.] A security for money lent was made in the form of a conveyance to the lender on trust to sell. He entered into possession and remained in possession for more than twenty years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount then due for principal, interest, and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited:—*Held* (by *Malins*, V.C., and by the Court of Appeal), that such a security is simply a mortgage; also that a mortgagee who has been in possession for more than twenty years may make a title and convey under his power of sale. —*Held* (by the Court of Appeal, reversing the decision of *Malins*, V.C.), that the devisees in trust could only convey as owners in fee, and that the mortgagors had no right to the surplus of the purchase-money.—*Locking* v. *Parker* (Law Rep. 8 Ch. 30) explained. *In re* ALISON. JOHNSON *v.* MOUNSEY - - - - C. A. 284

LIQUIDATION BY ARRANGEMENT 220, 278, [724
See BANKRUPTCY. 8, 12, 18.

LIQUIDATOR—Election of—Voting - 109
See COMPANY. 7.

LORD OF MANOR—Right to approve—Foldcourse - - - - 798
See COMMON.

LOTTERY - - - - - 170
See ILLEGALITY.

LUNATIC—Trustee Acts - - - 888
See TRUSTEE ACTS.

MAINTENANCE—Gift of income for - 406
See WILL. 6.

—— Infant - - - - - 272
See INFANT. 2.

MAN-HOLE—Sewer - - - - 838
See PUBLIC HEALTH ACT.

MARRIAGE SETTLEMENT - - 640, 645, 745
See SETTLEMENT. 2, 3, 4.

MARRIED WOMAN.
See HUSBAND AND WIFE.

MAYOR'S COURT—Foreign attachment—Proof in bankruptcy - - - 220
See BANKRUPTCY. 12.

MEASURE OF DAMAGES - - - 82
See DAMAGES.

MEETING OF SHAREHOLDERS—Voting—Show of hands—Poll - - - 109
See COMPANY. 7.

METROPOLITAN BUILDINGS ACT (18 & 19 *Vict. c.* 122), *ss.* 3, 88—*Party-wall.*] The Plaintiff was the owner of a boundary wall built on his own land, against which he had built some closets, and the Defendant, his adjoining neighbour, had recently built a substantial structure:—*Held*, that, so far as these buildings extended against both sides of the wall, it was a "party-wall" within the *Metropolitan Buildings Act* (18 & 19 Vict. c. 122), and the Defendant was entitled, on giving the proper notices under the Act, to take down such part as might be necessary for the purpose of necessary rebuilding. KNIGHT *v.* PURSELL 412

MINE—*Use of Property—Water discharged into Neighbouring Mine—Appropriation of Water.*] The Defendants, the owners of a mining property, sunk a shaft by which they tapped the water which had formerly found its way into certain old workings on their own ground, and had thence percolated into the Plaintiffs' mines. The Defendants then made a borehole at the bottom of the shaft. It was admitted that the making it was not in due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to let off the water into the abovementioned old workings on the Defendants' ground, whence it percolated into the Plaintiffs' works in the same way in which it would have done if neither shaft nor borehole had ever been made:—*Held* (reversing the decision of *Fry*, J.), that the Defendants had not by making the shaft so appropriated the water as to lay themselves under an obligation to keep it from coming upon the Plaintiffs' land, and that, as the effect of the Defendants' operations was not to throw upon the Plaintiffs' land any burden which it had not borne before, the Plaintiffs' case failed. WEST CUMBERLAND IRON AND STEEL COMPANY *v.* KENYON - - - - - C. A. 782

—— Power to purchase—Railway Clauses Act—Express purchase - - - 421
See RAILWAYS CLAUSES ACT.

MISDESCRIPTION OF DEBTOR—Liquidation petition - - - - 724
See BANKRUPTCY. 18.

MISTAKE—Practice—Undertaking by Defendant
See PRACTICE. 24. [763

MORTGAGE—*Leaseholds—Deposit of Title-deeds with Mortgagee's Solicitor—Fraudulent Dealing by Solicitor with Indenture of Lease—Redemption —Indemnity — Compensation — Interest— Costs—Action to recover Deed.*] *A. B.*, possessed of leasehold premises for a long term, in February, 1872, mortgaged them to trustees, and handed to their solicitor the indenture of lease and other title-deeds. On the 25th of September, 1876, it was arranged between the parties that *A. B.* should redeem at once, he paying with the principal moneys three months' interest in lieu of the usual notice. It was afterwards discovered that the trustees had not in their possession the indenture of lease, and therefore *A. B.* could not safely redeem.—After *A. B.* commenced this action he was informed, and the fact was certified by the Chief Clerk, that the trustees' former solicitor had frau-

MORTGAGE—*continued.*

dulently deposited the deed to secure moneys lent to him.—*A. B.* alleged that he had sustained damage in being prevented from redeeming, and claimed an account; a reconveyance of the premises and a delivery of the title-deeds; and if the indenture of lease were lost, an indemnity in respect of the loss; an attested copy of the deed, and compensation, and costs:—*Held*, that the Plaintiff should have liberty to bring an action to recover the deed; that if he could not recover it he would be entitled to an indemnity; that he was right in coming to the Court to have the matter inquired into and his title made clear; and that he was entitled to all his costs of the action, but that he was not entitled to any compensation for the loss of the deed; and that, in accordance with the arrangement made in September, 1876, only three months' interest ought to be paid. James *v.* Rumsey - - - - - 398

2. —— *Reversionary Interest—Expectant Heir—Pecuniary Distress—Want of Information—Hard Bargain—Security to stand only for Sums Advanced—Interest—3 & 4 Will. 4, c. 27, s. 42.*] In 1858, the Petitioner, then a married woman, and her three brothers, being entitled, in reversion expectant on the death of their mother, to a sum of money charged by a settlement on land, and being in pecuniary distress, borrowed £250 on the security of their reversionary interest. By a deed dated the 22nd of December, 1858, which recited that £500 had been borrowed and advanced, it was witnessed that in consideration of £500 that day paid by *B.*, the property was granted by the four co-owners to *B.* by way of mortgage in the usual form, and a receipt of £500 was indorsed. The deed was executed and receipt signed by the four co-owners, though £250 only was advanced. On the 22nd of December, 1859, £12 10*s.* was paid by way of interest. In 1860 the four co-owners borrowed a further sum of £150 from *B.*, and by another deed dated in June, 1860, after reciting that although £250 only was advanced in 1858, it was then considered that the difference between £250 and £500 was a fair remuneration for the delay in payment until the death of the tenant for life, it was now witnessed that in consideration of £150 that day paid by *B.*, the four co-owners further charged the property with £300, and declared that the £300 was a reasonable and fair equivalent to *B.* for the present payment of £150, taking into consideration that *B.* paid for the security, the age and state of health of the tenant for life, that *B.* would be prevented from using the money in his business, and that the offer had been refused by other lenders. The deed then contained a covenant by *B.* not to call in the principal thereby secured during the life of the tenant for life, except only in case of non-payment of interest. Neither of the above deeds was acknowledged by the Petitioner. Both deeds were prepared for all parties by the same solicitor, to whom *B.* shortly afterwards, in consideration of £400, transferred the two debts and the securities. No interest after the 22nd of December, 1859, was ever paid.—The tenant for life having died, and the settlement trustees having paid the fund into Court, the Petitioner, now a widow, prayed that one-fourth of the fund might be paid to her; and

MORTGAGE—*continued.*

as to the remaining three-fourths, that the deeds might stand as a security only for the moneys actually advanced, with interest and costs.—The Petitioner's title to one-fourth of the fund absolutely not being disputed:—*Held*, that the remaining three-fourths of the fund must stand as a security only for the sums actually advanced, with interest and costs:—*Held*, further, that the mortgagee was entitled to only six years' interest, notwithstanding that the proceeding was by petition for payment out of the fund. *In re* Slater's Trusts - - - - - - 227

3. —— *Second Mortgage—Consolidation.*] A mortgagee of two estates, *A.* and *B.*, of which *A.* was subject to a first mortgage, in exercise of a power of sale in his mortgage, sold the estate *A.* The first mortgagee, to whom another debt was due upon an equitable deposit of a policy of assurance and other documents by the mortgagor, refused to join in the conveyance to the purchaser, unless he received out of the purchase-money the amount due to him on both his mortgages. That amount was paid to him accordingly, and the documents comprised in the equitable deposit were delivered to the second mortgagee. The balance of the proceeds of sale was insufficient to discharge what was due to the second mortgagee:—*Held*, by *Fry*, J., that, inasmuch as the second mortgagee was never the owner of the equitable mortgage, but it had been discharged out of the purchase-money, he had no right to consolidate the equitable mortgage with his other mortgage, and he was ordered to deliver up the deposited documents to the trustee in bankruptcy of the mortgagor.—*Held*, on appeal, that as the equitable mortgage was paid with money which, had the first mortgage not claimed the right to consolidate, would have belonged to the second mortgagee, it was in fact paid by the second mortgagee, who by the fact of such payment became equitable transferee, and was entitled to consolidate that mortgage with his mortgage on estate *B.* Cracknall *v.* Janson - C. A. 1

—— Foreclosure—Practice - - 121, 204, 205
See Practice. 16, 17, 18.

—— Fraudulent conveyance—Execution without knowledge of mortgagee - - 1
See Fraudulent Conveyance.

—— Injunction in bankruptcy - - 278
See Bankruptcy. 8.

—— Payment of—Authority of solicitor to receive money - - - - 525
See Solicitor. 1.

—— Proof in bankruptcy—Valuation of security
See Bankruptcy. 14. [62

—— Registration—Directors of company - 579
See Company. 3.

—— Trust for sale—Statute of Limitations 284
See Limitations, Statute of.

MORTGAGE BOND—"Company—Winding-up"—Petition by bondholder - - 372
See Company. 2.

MORTMAIN - - - - - 949
See Charity.

NAME OF COMPANY—Right to use - 97
See Company. 4.

NECESSITY—Way of - - - - 968
See WAY. 2.

NEGATIVE EASEMENT—Prescription - 852
See NOISE.

NEGOTIABLE INSTRUMENT—Right of surety
See PRINCIPAL AND SURETY. [88

NEXT OF KIN—"Without having been married"—Child - - - - 270
See SETTLEMENT. 1.

NOISE—*Easement — Prescription — Prescription Act* (2 & 3 *Will.* 4, *c.* 71)—*User—Affirmative and Negative Easements.*] User which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement. And this is applicable both to affirmative and negative easements.—On this principle the right to make a noise so as to annoy a neighbour cannot be supported by user unless during the period of user the noise has amounted to an actionable nuisance.—In considering whether any act is a nuisance, regard must be had not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one locality might not be so in another. A confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nuisance and were not complained of. But in 1873 the physician erected a consulting-room at the end of his garden, and then the noise and vibration became a nuisance to him. He accordingly brought an action for an injunction:—*Held*, (affirming the decision of *Jessel*, M.R.), that the Defendant had not acquired a right to an easement of making a noise and vibration, and the injunction was granted. STURGES *v.* BRIDGMAN [C. A. 852

NOTICE—Appeal—Cross notice - 1, 539, 873
See PRACTICE. 3, 4, 27.

—— Assignment of debt - - - 198
See ASSIGNMENT OF DEBT.

—— Constructive - - - - 790
See LIGHT AND AIR.

ORDER AND DISPOSITION—Winding-up of company - - - - - 755
See COMPANY. 13.

ORIGINAL OR SUBSTITUTIONAL GIFT - 663
See WILL. 4.

OWNER—Adjacent lands—Trees overhanging highway - - - - 214
See HIGHWAY.

PARTIES—Striking out name of Defendant 436
See PRACTICE. 1.

PARTITION—*Action for—Partition Act* (31 & 32 *Vict. c.* 40), *ss.* 3, 4, 5—*Some Parties desiring a Sale—Offer by others to purchase.*] The 3rd section of the *Partition Act* is not controlled by the 5th section.—In a partition suit the Plaintiffs, who were entitled to three-sixteenth shares of the property, desired a sale; the Defendants, who were entitled to the remaining thirteen-sixteenths, objected to a sale, but offered to take the Plaintiffs' shares at a valuation under the 5th section of the Act.—The number of parties interested and the

nature of the property were such that the Court was of opinion that a sale would be beneficial to all parties:—*Held* (reversing the decision of *Malins*, V.C.), that, the conditions of the 3rd section being fulfilled, a sale ought to be directed, with liberty to all parties, other than those having the conduct of the sale, to bid. GILBERT *v.* SMITH [C. A. 78

2. —— *Action for—Motion on Admissions in Pleadings—Order for Sale—Rules of Court*, 1875, *Order XL., r.* 11.] An order for sale may be made in a partition action on a motion upon admissions in the pleadings under Rules of Court, 1875, Order XL., rule 11. In such an order the Court will direct an account of rents and profits received by the Plaintiff, where he has been in possession, and adjourn further consideration. BURNELL *v.* BURNELL - - - - - 213

3. —— *Action for—Practice—Sale Moneys—Real Estate—Married Woman—Payment to Husband—Election to take as Personal Estate—Examination in Court.*] The share of a married woman in the proceeds of sale of real estate devised to her in fee, and which has been sold under an order in a partition action, may be paid to her husband on her electing by examination in Court to take the money as personal estate.—Observations on *In re Hayes* (9 W. R. 769). STANDERING *v.* HALL - - - - - 652

PARTNERSHIP—*Building Speculation—Agreement to provide Capital—Services rendered—Division of Profits and Losses—Agreement not to be construed as a Partnership.*] An agreement in reference to a building speculation upon the *S.* estate, bought with the money of *A.*, provided that *B.*, in consideration of his services to enable *A.* to realize the estate, should be paid one-half of the profits after *A.* had made certain payments; that *B.* should bring in a third of certain fees which he might receive from builders, and bear one-half of any losses, and generally it was agreed that he should receive and bear one-half of the profits and losses upon the whole transaction; but the agreement was not in any way to be construed into a partnership between the parties, and should wholly and solely relate to the *S.* estate. *B.'s* services were to be the consideration for the agreement, and he was not to charge for his time and trouble, but only actual disbursements made by him for the benefit of the estate and for realizing it for *A.* and *B.'s* mutual benefit:—*Held*, that the agreement constituted a partnership between the parties, and a dissolution was declared. MOORE *v.* DAVIS 261

—— Action—Costs - - - - 942
See PRACTICE. 11.

—— Common partner in firm—Vendor and purchaser - - - - 68
See SALE OF GOODS. 1.

—— Two firms with same members - 317
See BANKRUPTCY. 11.

PARTY-WALL - - - - 412
See METROPOLITAN BUILDING ACT.

PAST MEMBER—Company—Contributory 386
See COMPANY. 9.

PATENT—Account—Stay of proceedings pending appeal - - - - 136
See PRACTICE. 28.

PETITION—Adjudication of bankruptcy—Practice - - - - 303, 911
See BANKRUPTCY. 3, 17.

—— Liquidation—Practice - - - 724
See BANKRUPTCY. 18.

—— Winding-up—Practice - 36, 256, 372, 701
See COMPANY. 2, 8, 10, 12.

PERPETUITY—Covenant to give right of preemption - - - - 421
See COVENANT. 2.

—— Power of appointment - - - 959
See POWER.

—— Restraint on alienation - - 645
See SETTLEMENT. 4.

—— Will—Class - - - - 555
See WILL. 5.

PLEADING - - 121, 392, 394, n., 759
See PRACTICE. 7, 18, 21, 22.

—— Estoppel—Verdict on issue - - 798
See ESTOPPEL.

POLICY OF INSURANCE - - - 363
See INSURANCE.

POWER—*Power of Appointment — Exclusive—Exercise of—Forfeiture Clause—Change of Religion by Appointee—Cesser of Life Interest—Remoteness—Public Policy.*] A testatrix, by will, dated in 1845, limited to a daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, and declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish and adopt the Christian or any other religion, then such son or daughter should forfeit all share in the fund, and in case of forfeiture the forfeited share was to accrue and go over to the other or others of the children living at the time of the forfeiture.—*Julius*, a son of the appointor, married a Christian in his mother's lifetime, but without her consent. The Plaintiff, one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death.—Both *Julius* and the Plaintiff were born after the death of the creator of the power:—*Held*, first, that the forfeiture clause was not void as against public policy:—Secondly, that it was effectual as to the shares of children marrying Christians or becoming Christians during the lifetime of the appointor, and therefore that the share of *Julius* was forfeited;—Thirdly, that the forfeiture clause must be read in conjunction with the gift over, and therefore that, so far as it affected, after the death of the appointor, the share of a child born after the death of the creator of the power, it was void for remoteness, whether such share was appointed for life only or absolutely, and consequently that the Plaintiff had not forfeited her share. HODGSON *v.* HALFORD 959

POWER OF SALE—Mortgage — Mortgagee in possession - - - - 284
See LIMITATIONS, STATUTE OF.

PRACTICE—*Amendment of Pleadings — General Liberty to amend—Striking out Name of Defendant not specified—Defendant whose Interest has ceased—Revivor—Costs — Rules of Court*, 1875, *Order XVI., rr.* 13, 14.] Under an order to strike out the name of one Defendant and giving general liberty to amend, the Plaintiff is not justified in striking out the name of another Defendant.—A Defendant whose interest has ceased pending the suit cannot obtain payment of his costs. WYMER *v.* DODDS - - - - 436

2. —— *Appeal—Abandoned Notice of Appeal.*] A final decree having been passed and entered on the 4th of December, the Defendant on the following day served notice of appeal for the 19th, but by mistake his solicitor did not set it down till the 19th. A few days afterwards the Plaintiff's solicitor informed the Defendant's solicitor that the appeal had not been set down in time, and stated that he should insist on the objection. The Appellant's solicitor then sent to the Plaintiff's solicitor a fresh notice of appeal, offering to pay the costs occasioned by the first and asking him to consent to the first entry of the appeal being struck out. The Plaintiff's solicitor refused to comply with this request, and returned the second notice of appeal. The Defendant set down the second notice, and moved to have the first entry struck out, and to have the second notice and the entry of it treated as valid:—*Held*, that the appeal must proceed on the second notice; and the applicant's costs were made costs in the appeal, no costs of the motion being given to the Plaintiff. NORTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - C. A. 118

3. —— *Appeal—Cross Notice—Co-respondents—Rules of Court*, 1875, *Order LVIII., r.* 6.] On the application of a trustee in bankruptcy, the Registrar of a County Court declared two bills of sale which the bankrupt had executed void against the trustee. On appeals by the two grantees, the Chief Judge affirmed the decision as to the first bill of sale, but held that the second bill of sale was valid as against the trustee. The first grantee gave notice of appeal, addressed to the trustee and to the second grantee. The trustee gave no original notice of appeal, but served notice on both the grantees that, on the hearing of the first grantee's appeal, he should contend that the decision of the Chief Judge as to the second bill of sale ought to be varied in his favour:—*Held*, that this was a good notice under Rules of Court, 1875, Order LVIII., rule 6. *Ex parte* PAYNE. *In re* CROSS - C. A. 539

4. —— *Appeal—Cross Notice.*] Notice by a Respondent under Rules of Court, 1875, Order LVIII., rule 6, to vary the decision of the Court was proceeded upon, though the point was one in which the original Appellant had no interest. RALPH *v.* CARRICK - - - C. A. 873

5. —— *Appeal—Security for Costs.*] It is not the practice of the Court of Appeal when ordering an Appellant to give security for costs to fix a time within which this is to be done. If the order is not complied with in a reasonable time the Respondent may move to dismiss the appeal for want of prosecution; but what is a reasonable time must depend on the circumstances of each

PRACTICE—*continued.*

case.—*In re Ivory* (10 Ch. D. 372) explained. Polini *v.* Gray. Sturla *v.* Freccia C. A. 741

6. —— *Appeal—Staying Proceedings—Action altogether dismissed—Injunction granted by Court of Appeal—Rules of Court*, 1875, *Order* lviii., *rr.* 2, 5, 16, 17.] When an action has been altogether dismissed by a Divisional Court no order can be made under Rules of Court, 1875, Order lviii., rule 16, to stay proceedings pending an appeal; but the Court of Appeal will, in a proper case, grant an injunction to restrain any of the parties parting with property till the hearing of the appeal. Wilson *v.* Church - C. A. 576

7. —— *Close of Pleadings—Plaintiff's Delay in delivering Reply—Motion by one Defendant to dismiss for want of Prosecution—Delivery of last of Defences—Enlargement of Time to other Defendants—Enlargement by Consent—Order unnecessary—Rules of Court*, 1875, *Order* xxii., *r.* 1; xxiv., *r.* 1; xxix., *r.* 12; xxxvi., *rr.* 4, 4*a*.] Where one of several Defendants in an action has delivered his defence, and the time for the Plaintiff to deliver his reply to such defence has expired, but the Plaintiff has, without the knowledge of that Defendant, agreed in writing with the other Defendants to extend the time for delivering their defences, that Defendant cannot move to dismiss the action as against him for want of prosecution, the pleadings not yet being closed within the meaning of Order xxix., rule 12, and Order xxxvi., rules 4, 4a, of the Rules of Court, 1875. A Defendant's proper course under such circumstances is to write to the Plaintiff's solicitor, and inquire how the action stands as regards the other Defendants.—If a Plaintiff consents in writing to grant a Defendant an extension of time for the delivery of his defence under Order xxii., rule 1, an order for the purpose is unnecessary. Ambroise *v.* Evelyn - - - - 759

8. —— *Contempt — Attachment — Ineffectual Service of Order—Delivery of untrue Copy—Infants' Custody Act*, 1873 (36 & 37 *Vict. c.* 12.] An order that a father named *Holt* should deliver over his infant daughter to her mother was intituled in the matter of the infant (naming her) and in the matter of the Act 36 & 37 Vict. c. 12. The copy delivered to the father on serving him with the order was intituled only in the matter of the Act, and not in the matter of the infant, but it was indorsed on the outside "*Re Holt.*" The order was not obeyed, and an order was then made to attach the father, and he was arrested and lodged in prison:—*Held*, that the service of the first order was ineffectual, and that the order to attach must be discharged as irregular. *In re* Holt - - - - - C. A. 168

9. —— *Costs of Abandoned Notice of Appeal.*] The costs of an application for the costs of an abandoned notice of appeal will not be allowed unless a previous demand for payment of them has been made and not complied with. Griffin *v.* Allen - - - - C. A. 913

10. —— *Costs — Apportionment of Costs — Claim dismissed — Counter-claim dismissed.*] Where the Plaintiff's claim and Defendant's counter-claim are both dismissed with costs, the Plaintiff is to pay to the Defendant the general costs of the action, and the Defendant is to pay to

PRACTICE—*continued.*

the Plaintiff only the amount by which the costs have been increased by reason of the counter-claim. Saner *v.* Bilton - - - 416

11. —— *Costs—Partnership Action—Misconduct of Partner—"Partnership Assets"—Solicitor—Charging Order—Proceeding by Summons or Petition—Title of Proceeding—Garnishee Order Nisi—Service—Priority—Attorneys and Solicitors Act*, 1860, *s.* 28—*Rules of Court*, 1875, *Order* xlv., *rr.* 2, 3, 6.] The rule as to costs in a partnership action is the same as in any other administration action, that is, they are payable out of the assets; "partnership assets" meaning the assets remaining after payment of all the partnership debts, including balances due to any of the partners. If the assets are insufficient for payment of the costs of the action, then such costs must be borne by the partners in proportion to their shares in the profits.—Where, however, a partnership action has been rendered necessary by the negligence or other misconduct of a partner, the Court will order that partner to pay the costs of the action so far as they have been occasioned by his misconduct, including the costs up to the trial.—An order giving a solicitor a charge under sect. 28 of the *Attorneys and Solicitors Act*, 1860, for his costs as between solicitor and client, on property recovered by him for his client in an action, is sufficient if intituled in the action; it may be obtained either on summons or petition, and need not be intituled either in the matter of the Act or of the solicitor.—A garnishee order *nisi* does not create a charge until service of it on the garnishee.—A judgment creditor of the Defendant in a partnership action obtained a garnishee order *nisi* to attach all moneys in the hands of the receiver in the action appearing to be due to the Defendant on taking the accounts. On the following day, and before service of the order *nisi*, the Defendant's solicitors obtained, on a summons served on the receiver, a charging order intituled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the Defendant under the action. On the next day the garnishee order *nisi* was served on the receiver, and was subsequently made absolute:—*Held*, that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order both under the Act and independently of it. Hamer *v.* Giles. Giles *v.* Hamer. Austin *v.* Jackson [942

12. —— *Costs — Taxation—Counsel's Fees — Refreshers.*] In taxing the costs of an action in the Chancery Division tried on oral evidence, the Taxing Master should follow the rule in the Common Law Divisions of allowing refreshers to counsel for every day occupied by a trial beyond one day's time; but where the action is tried on affidavit evidence no refreshers should be allowed.—The amount of the refreshers lies in the discretion of the Taxing Master, and depends on the fee originally marked on the brief and the nature of the case.—The rule in *Smith* v. *Buller* (Law Rep. 19 Eq. 473), that the criterion for allowing refreshers is the length of time occupied by the trial, irrespective of the mode in which the evidence has been taken, dissented from. Harrison *v.* Wearing - - - - 206

PRACTICE—*continued.*

13. —— *Damages under Lord Cairns' Act* (21 & 22 *Vict. c.* 27), *s.* 2—*Injunction—Right of Way.*] Where a Plaintiff has established his right to a perpetual injunction against the Defendant the Court has no power under *Lord Cairns' Act* to oblige him against his will to accept damages in lieu of the injunction.—The decision of *Jessel*, M.R., affirmed. KREHL *v.* BURRELL - C. A. 146

14. —— *Deceased Plaintiff—Appointment of Legal Personal Representative—Motion to dismiss* —15 & 16 *Vict. c.* 86, *s.* 44.] A sole Plaintiff died insolvent, and, so far as could be ascertained, intestate.—On the application of the sole Defendant for an order appointing a person to represent the estate of the Plaintiff, that he (the Defendant) might have an opportunity to move for dismissal of the action in default of due prosecution thereof; —The Court made the order appointing a person to represent the deceased Plaintiff's estate. WINGROVE *v.* THOMPSON - - - - 419

15. —— *Decree of House of Lords—How made an Order of Court of Chancery.*] An application to have an order of the House of Lords, reversing a decision of the Court of Appeal, made an order of the Court of Chancery, should be made to the Court of first instance, where the decree appealed from was originally made. BRITISH DYNAMITE COMPANY *v.* KREBS - - - - 448

16. —— *Foreclosure—Equitable Mortgagee—Right to either Sale or Foreclosure—Chancery Procedure Act*, 1852 (15 & 16 *Vict. c.* 86), *s.* 48.] An equitable mortgagee by deposit of deeds accompanied by an agreement to execute a legal mortgage, is entitled to either sale or foreclosure. YORK UNION BANKING COMPANY *v.* ARTLEY 205

17. —— *Foreclosure—Mortgage—Interlocutory Application for Sale—Chancery Procedure Act*, 1852 (15 & 16 *Vict. c.* 86), *s.* 55.] The 55th section of the *Chancery Procedure Act*, 1852, does not authorize the Court in an ordinary foreclosure action to direct a sale on an interlocutory application.—*Davis* v. *Ashwin* (47 L. J. (Ch.) 70; 26 W. R. 139) questioned. LONDON AND COUNTY BANKING COMPANY *v.* DOVER - - 204

18. —— *Foreclosure—Pleading—Action for Foreclosure by one of several Mortgagees—Rules of Court*, 1875, *Order XVI., r.* 13.] One of several mortgagees can maintain an action to foreclose the mortgage, making the others co-defendants if they are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs.—The act of a majority of trustees cannot bind a dissenting minority nor the trust estate. In order to bind the trust estate the act must be the act of all the trustees. The decision of *Fry*, J., reversed. LUKE *v.* SOUTH KENSINGTON HOTEL COMPANY - - - - C. A. 121

19. —— *Injunction—Restraining Sale by Sheriff—Interpleader Order—Judicature Act*, 1873, *s.* 24, *sub-s.* 5.] Goods having been taken in execution under a *fi. fa.* against *W.*, the trustee of Mrs. *W.'s* settlement claimed them as separate estate of the wife. The sheriff thereupon took out an interpleader summons in the Common Pleas Division, upon which an order was made that upon the trustee paying £115 into Court within a limited time, the sheriff should withdraw, but in default of such payment being made, should sell, and pay the proceeds into Court, and that the parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into Court by the trustee within the time, and the sheriff advertised the goods for sale. Mrs. *W.* thereupon commenced an action in the Chancery Division to have the trusts of the settlement carried into execution, a new trustee appointed, and, in the meantime, for the appointment of a receiver. An injunction to restrain the sheriff from selling the goods or remaining in possession of them was granted by *Malins*, V.C.:—*Held*, on appeal, that this order was a restraining by injunction a proceeding pending in the Common Pleas Division, and was inconsistent with the *Judicature Act*, 1873, s. 24, sub-s. 5, and must be discharged. WRIGHT *v.* REDGRAVE - C. A. 24

20. —— *Interrogatories—Summons for further Answer—Particulars—Rules of Court*, 1875, *Order XXXI., r.* 10.] A summons for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required.—*Chesterfield Colliery Company* v. *Black* (24 W. R. 783) followed. ANSTEY *v.* NORTH AND SOUTH WOOLWICH SUBWAY COMPANY [439

21. —— *Issues between Co-Defendants—Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order XVI., r.* 17.] Plaintiff jointly with Defendant *B.* entered into a contract with Defendant *E.* to work a trading adventure on lands belonging to *E.* Plaintiff by his claim alleged that *E.* had obtained the contract from him and Defendant *B.* by misrepresentation, and asked for rescission, and in the alternative for dissolution. Defendant *B.* delivered a pleading, which was at the same time his defence in the action, a reply to a counter-claim by *E.*, and a new claim as in an action against *E.*:—*Held*, that he was entitled to prosecute in this action his claim against *E.*; and that delivery to the Defendant *E.* of the said pleading should be notice, under the statute, of the claim of Defendant *B.* against him.—Form of order considered. BAGOT *v.* EASTON. EASTON *v.* BAGOT. BAGOT *v.* EASTON - - - 392

22. —— *Issue between Co-Defendants—Notice to Third Party—Judicature Act*, 1873, *s.* 24—*Rules of Court*, 1875, *Order XVI., r.* 17.] Where a Defendant wishes to try an issue between himself and a co-Defendant in which the Plaintiff is not concerned, the proper course is for him to make a claim against him in his statement of defence, and to obtain an order in Chambers that the delivery of the statement of defence to the co-Defendant shall be notice to the co-Defendant under the *Judicature Act*, 1873, s. 24, and Order XVI., r. 17. MARNER *v.* BRIGHT - - - - 394, n.

23. —— *Joinder of Causes of Action—Leave of Court—Enlarging Time—Rules of Court*, 1875, *Order XVII., r.* 2; *Order LVII., r.* 6.] An application for leave to join another action with an action for the recovery of land must be made before the writ is issued.—Where another action had been joined with an action for the recovery of land without leave, the Court refused to grant leave to continue the action in that form although the Defendants had appeared.—The rule which enables the Court

PRACTICE—*continued.*

to enlarge the time for doing an act is not applicable to such a case. Decision of *Fry* J., affirmed. *In re* Pilcher. Pilcher *v.* Hinds - C. A. 905

24. —— *Order by Consent—Undertaking by Defendant—Mistake on one Side only.*] The Court has jurisdiction to discharge an order made on an interlocutory application by consent when it is proved to have been made under a mistake, though that mistake was on one side only.—Where on motion for a mandatory injunction an order was made by consent pursuant to the terms of a previous agreement by which the Defendant gave an undertaking to remove certain obstructions, and it appeared that the Defendant had by mistake consented to a more extensive undertaking than he intended to do, the Court refused to enforce that part of the undertaking which had been given by mistake. Mullins *v.* Howell - 763

25. —— *Production of Documents—Interlocutory Order for Delivery up of Documents—Production of Documents before Delivery of Statement of Claim—Rules of Court*, 1875, *Order* xxxi., *r.* 11.] Where the object of an action is to obtain delivery up of documents in the possession of the Defendants, the Court will not order them to be delivered up upon an interlocutory application before the Defendant has put in his defence.—Whether there is any general rule of practice that the Plaintiff cannot obtain an order for production of documents before he has delivered his statement of claim, *quære*. Republic of Costa Rica *v.* Strousberg - - - - C. A. 323

26. —— *Service out of the Jurisdiction—Rules of Court*, 1875, *Order* xi., *rr.* 1, 1*a*.] On the marriage of an Englishman, domiciled in *England*, with a Scotch lady, a settlement in Scotch form was made of her property, under which, after the death of the wife, the property went to the children of the marriage, subject only to an annuity to the husband. On the death of the wife, the only child of the marriage, an infant, resident with his father in *England*, commenced an action against the trustees to have the trusts administered by the Court, alleging that the trustees improperly refused to allow maintenance out of the income. The trust property was all in *Scotland*, and the trustees all resided there. An order having been obtained for leave to serve the writ upon the trustees in *Scotland*:—*Held*, by the Court of Appeal, that, assuming that there was jurisdiction under Rules of Court, 1875, Order xi., rule 1, to allow service of the writ in *Scotland*, still under the discretion given by Order xi., rule 1*a*, such service ought not to be authorized, as it was more convenient and proper that the trusts of Scotch property held by Scotch trustees upon the trusts of a Scotch instrument should be administered by a Scotch than by an English Court.—*Semble*, that under Order xi., rule 1, there was no jurisdiction to order service of the writ in *Scotland*. Cresswell *v.* Parker - - - C. A. 601

27. —— *Striking out Pleadings—Scandalous Matter—Costs—Prolix Affidavits—Special Direction to Taxing Master—Additional Rules of Court, August*, 1875, *Order* vi., *r.* 18.] The Plaintiff having appealed from part of a judgment, and the Respondent having given a cross notice of appeal, *held*, that the judgment could be varied in the Plaintiff's favour on a point not mentioned in his notice of appeal:—*Held*, by *Fry*, J., that the Court has power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, on the application of any person, even a stranger to the action, or *mero moto*. It is not necessary that an application should be made by the injured person.—Direction given to the Taxing Master under rule 18 of Order vi. of the Additional Rules of Court, 1875, to look into and to disallow the costs of affidavits of unnecessary length. Cracknall *v.* Janson [C. A. 1

28. —— *Stay of Proceedings pending Appeal—Account—Infringement of Patent—Costs of Application to stay.*] In an action by a patentee to restrain alleged infringements of letters patent for the manufacture of pumps, a judgment was made granting a perpetual injunction against the Defendants, who were pump manufacturers, and directing an account of the profits made by them by the sale of pumps made in infringement of the letters patent. The Defendants forthwith gave notice of appeal, and set the appeal down for hearing, and then applied to stay proceedings under the account till the appeal was heard. This application was refused by *Bacon*, V.C.:—*Held*, that as the discovery given by the account would enable the Plaintiff to take proceedings against the customers of the Defendants, and the Defendants, supposing them to be ultimately successful, might thus sustain irreparable injury in their business, the appeal ought to be advanced, and proceedings under the account stayed till the hearing. Costs of the application made costs in the appeal. *Merry* v. *Nickalls* (Law Rep. 8 Ch. 205) distinguished. Adair *v.* Young. C. A. 136

29. —— *Trial by Jury—Trade-Name—Rules of Court*, 1875, *Order* xxxvi., *rr.* 3, 26.] An action to restrain the use of a trade-name involved, besides the usual trade-mark issues, the special question, whether the name had not become the name of a specific machine. Upon motion by Defendant for transfer of the action to a Common Law Division and entry for trial, and for the settlement of issues to be tried by Judge and jury:—*Held*, under Rules of Court, 1875, Order xxxvi., rules 3, 26, that the action was unfit for a jury, and motion refused. Singer Manufacturing Company *v.* Loog - - - 656

30. —— *Rules of Court*, 1875, *Order* xxxvi., *rr.* 3, 26—*Trial of Issues af Fact by Jury.*] A Defendant to an action in the Chancery Division for infringement of a trade-mark is not entitled as of right, under Rules of Court, 1875, Order xxxvi., to have the action tried before a Judge and jury, but only, subject to the discretion given to the Court by rule 26, to a trial by jury of issues of fact in the action; and such discretion of refusing a trial by jury will be exercised where the issue of fact fit to be tried by a jury is of minor importance as compared with the main questions involved in the action. Spratt's Patent *v.* Ward & Co. [240

31. —— *Trial of Issues, Order for—Application by Plaintiffs—Rules of Court*, 1875, *Order*

PRACTICE—*continued.*

XXXVI., r. 6—Undertaking by Plaintiff to discontinue Part of Action.] In an action against several Defendants involving various issues, the Plaintiffs having applied under Rules of Court, 1875, Order XXXVI., rule 6, for an order for two simple issues to be tried as between themselves and two of the Defendants before the rest of the action, the Court made the order on the Plaintiffs' undertaking not to seek relief against the said two Defendants in respect of any cause of action other than that covered by the issues so to be tried, and also discontinuing such portion of the action as the Court should direct. EMMA SILVER MINING COMPANY *v.* GRANT - - - - 918

32. —— *Trial—Evidence—Registration.*] All documents intended to be used in evidence ought to be formally put in at the trial and marked by the Registrar. WATSON *v.* RODWELL C. A. 150

—— Bankruptcy - - 56, 724, 869, 911
See BANKRUPTCY. 16—19.

—— Partition action - - - 78, 213, 652
See PARTITION. 1, 2, 3.

PRE-EMPTION—Covenant to give unlimited right —Perpetuity - - - 421
See COVENANT. 1.

PRESCRIPTION—Easement—Noise - 852
See NOISE.

PRINCIPAL AND AGENT—Banker—Following money - - - 772, 773, n.
See BANKER. 1, 2.

—— Wife's *chose in action*—Receipt by agent of husband and wife - - - 442
See HUSBAND AND WIFE. 1.

PRINCIPAL AND SURETY—*Parties to Negotiable Instrument—Right of Surety to Securities held by Creditor.*] The rules as to a surety's right to securities do not apply where the only suretyship is created by indorsing and discounting a bill of exchange.—*R.*, a member of the firm of *R. & Co.*, deposited with a bank the title deeds of his real estate to secure the floating balance due from the firm to the bank. After this *R. & Co.* bought a cargo from *D., F., & Co.*, and offered a bill accepted by themselves in part payment. *D., F., & Co.*, were unwilling to receive it, but said that if the bank, who were also their own bankers, would take the bill without their indorsing it, they would receive it in payment. The bank declined to do so, but the manager said he believed that the liability incurred by indorsing it would be merely nominal. *D. F. & Co.* thereupon indorsed it and paid it into the bank, who carried the amount to their credit. *R. & Co.* stopped payment before the bill became due, and executed a deed of inspectorship. The bank were still the holders of the bill. *D., F., & Co.* claimed to have the deposit security of *R.* handed over to them on their paying to the bank the floating balance due to them upon that security:—*Held* (reversing the decision of *Little*, V.C.), that *D., F., & Co.* had no claim upon this security, for that the mere fact of their being indorsers of a bill of exchange, though it made them in some sense sureties for the acceptor, did not do so for the purpose of entitling them to the benefit of securities which another party to the bill held from the acceptor;

PRINCIPAL AND SURETY—*continued.*

and, further, that the security in the present case was not a security given by the acceptor, but by a surety as between whom and *D., F., & Co.* the latter were primarily liable. DUNCAN, FOX, & CO. *v.* NORTH AND SOUTH WALES BANK C. A. 88

PRIORITY—Assets of bankers - 772, 773, n.
See BANKER. 1, 2.

—— Two bankruptcies—Sequestration - 731
See BANKRUPTCY. 15.

PRODUCTION OF DOCUMENTS - - 323
See PRACTICE. 25.

PROFIT—Participation in - - - 261
See PARTNERSHIP.

—— Promoter of company - - - 918
See COMPANY. 1.

PROOF—Bankruptcy.
See Cases under BANKRUPTCY. 10—14.

PROTECTED TRANSACTION—Bankruptcy 539
See BILLS OF SALE ACT.

PUBLIC HEALTH ACTS (11 *& 12 Vict. c.* 63, *ss.* 45, 46, *and* 38 *& 39 Vict. c.* 55)—*Construction of Sewers—Side-entrances or Man-holes—Compensation or Purchase.*] The Defendants, a local board of health, prior to 1875, constructed a sewer under a public footpath, the soil of which belonged to the Plaintiff, and they made a shaft thirty feet deep into the sewer, with an entrance or man-hole upon the footpath, at a point where there was a junction of two sewers. The Defendants also gave the Plaintiff notice after 1875 of their intention to make similar man-holes into their sewers upon other parts of the Plaintiff's property:—*Held*, by *Fry*, J., that these entrances or man-holes were not such works as formed part of the sewer within the meaning of the Public Health Acts of 1848 and 1875, but that they were works connected with the sewer, which required to be made upon land to be purchased for the purpose.—*Held*, on appeal, that they were parts of the sewer within the meaning of 11 & 12 Vict. c. 63, s. 45, and could be made without purchasing land for the purpose; and that the Plaintiff was only entitled to compensation for the damage arising from making them. SWANSTON *v.* TWICKENHAM LOCAL BOARD - - C. A. 838

PUBLIC POLICY—Change of religion - 959
See POWER.

PURCHASE WITHOUT NOTICE—Right of way
See WAY. 1. [327

QUIET ENJOYMENT—Covenant for—Measure of damages - - - - 82
See DAMAGES.

RAILWAY—*Superfluous Land—Alienation of Land not being "Superfluous Land"—Lands Clauses Act*, 1845, *s.* 127—*Railways Clauses Act*, 1845, *s.* 45—*Station built on Arches—Right of Way under Arch—Working Agreement—Words "manage, work, and use" Railway and Works—Claim by Purchaser of alleged Right of Way.*] A railway company, having the usual powers under their special Act to take and use land for the purpose of the railway and works, cannot, whether for valuable consideration or otherwise,

RAILWAY—*continued.*

alienate for any purpose except the purposes of the Act any portion of its land, not being "superfluous land" within sect. 127 of the *Lands Clauses Act*, 1845, and not being land taken for extraordinary purposes within sect. 45 of the *Railways Clauses Act*, 1845, nor any easement over the same.—Where a railway station is erected on arches on land thus taken, the part of the land under the arches is not "superfluous land" within sect. 127 of the *Lands Clauses Act*, 1845.—The *B. Railway Company*, having under their Act, acquired land, constructed their railway, and erected a station which was partly built on arches, sold to their contractors their superfluous land, and also purported to convey to them without consideration a right of way under one of the arches leading to the part of the land so sold though not being a way of necessity thereto. The contractors sold the land and alleged right of way to the Plaintiff. The *M. Railway Company* were, under the said Act, to enter into a working agreement with the *B. Railway Company*, the terms of which were embodied in the schedule to the Act, whereby, after the line was opened, the *M. Railway Company* were "to manage, work, and use" the railway and works, and to develop the traffic. This had been carried out. The *M. Railway Company* now required the arches under the station as warehouses for bonded goods, and the arch in question as a closed yard for loading and unloading such goods. In an action by the Plaintiff to restrain the *M. Railway Company* from interfering with his right of way:—*Held*, that the alienation of the right of way under the arch was *ultrà vires*; that the *M. Railway Company* were entitled to use the land under the arch in the way proposed; and that, their title being prior to that of the Plaintiff, who must be taken to have notice of the company's rights, his action could not be sustained. Mulliner *v.* Midland Railway Company - - 611

2. —— *Ultrà Vires—Hire of Rolling Stock by one Railway Company to another—Working Agreement—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 87.] The railway of the *T. Company* was a short line in connection with the lines of the *G. E. Company* and the *B. Company*, and all traffic which went over it passed over some part of the railways of those companies. By a local and personal Act in 1863, reciting a lease of the *T.* railway to certain lessees for a term to expire in 1875, and reciting that under an arrangement between the *G. E. Company* and the lessees the traffic was worked by the *G. E. Company*, powers were given to the three companies and the lessees to enter into arrangements for the modification of the lease, for the transfer of it to the *G. E. Company* and *B. Company*, or one of them, and for the granting of a new lease to one or both of those two companies; and it then provided that the *G. E. Company* and the *B. Company* might enter into agreements with respect to the working, maintenance, and management of the *T.* railway, or any part thereof, and of the railways of the two last-mentioned companies connected therewith. The *G. E. Company* afterwards became lessees of the *B.* railway for a long term. The lease of the *T.* railway having expired, the *G. E. Company* in

RAILWAY—*continued.*

1876 entered into an agreement with the *T. Company* to supply the *T. Company* with locomotive power for five years upon the terms therein mentioned, and with carriages, waggons, and break vans for two years. An action was commenced by the Attorney-General, at the relation of a manufacturer of rolling stock, to restrain the *G. E. Company* from letting rolling stock on hire, and from manufacturing any rolling stock for the purpose of so letting it:—*Held*, by the Master of the Rolls, that the agreement of 1876 was *ultrà vires*, and not authorized either by the Act of 1863 or by the *Railways Clauses Consolidation Act*, 1845, s. 87; and that as the *G. E. Company* by their defence claimed the right generally to let rolling stock, there was a case which entitled the Attorney-General to interfere on behalf of the public, and that an injunction ought to be granted; but that there would have been no case of mischief to the public which could lay ground for the interference of the Attorney-General if the *G. E. Company* had only let and claimed the right of letting on hire the rolling stock which they were obliged to have for the purposes of their own line.—*Held*, on appeal, by *James* and *Bramwell*, L.JJ. (*dissentiente Baggallay*, L.J.), that, apart from the local and personal Act, the letting on hire by the *G. E. Company* to the *T. Company*, whose line was connected with their own and could only be worked profitably in connection with it, parts of their surplus stock was not *ultrà vires*; that if it would otherwise have been so, it was authorized by the local and personal Act.—*Held*, also, by *James*, L.J., that, if it had been *ultrà vires*, no such case of public mischief was shewn as would entitle the Attorney-General to interfere; the mere fact that a proceeding is *ultrà vires* not being sufficient for that purpose unless injury to the public is shewn.—*Held*, by *Baggallay*, L.J., that when a company acts in contravention of its powers, it is the interest of the public that the law should be observed, and the duty of the Attorney-General to enforce it.—*Attorney-General* v. *Great Northern Railway Company* (1 Dr. & Sm. 154) discussed. Attorney-General *v.* Great Eastern Railway Company [C. A. 449

3. —— *Working Agreement—Powers to "maintain and work"—Right of Exclusive Possession and Maintenance in Working Company—Improvements included in Powers of Maintenance.*] The *S. Railway Company* were authorized by their Act to "make and maintain" a railway, with all proper stations, approaches, and works, and were empowered to transfer or sell the railway before or after completion, and all the powers of the company, to the *D. Railway Company*. By a working agreement, the terms of which were incorporated in the Act, it was provided that the *S. Company* were to complete the line, and that, when completed, it should be maintained and worked by the *D. Company* in perpetuity, and that they were to pay an annual sum to the *D. Company*. On the completion of the line the *D. Company* took possession of and worked the same under the agreement, but no sale to them of the railway had been effected. While the *D. Company* was thus in possession the *S. Company*, acting

RAILWAY—*continued.*
under the alleged powers in the Act, in order to provide a better access to a station on the line, erected some stone steps in the station yard, which the *D. Company* removed. In an action for a mandatory injunction to compel the *D. Company* to restore the steps:—*Held*, that, on the true construction of the Act and working agreement incorporated therewith, the *D. Company* were entitled to the exclusive possession and right of maintenance of the railway and works; and that the erection of the steps was a work of maintenance, and was a wrongful act on the part of the *S. Company*.—Under power to "maintain" a railway and works, reasonable improvements, consistent with the purpose of the undertaking, are included. Sevenoaks, Maidstone, and Tunbridge Railway Company *v.* London, Chatham, and Dover Railway Company - - 625

RAILWAYS CLAUSES ACT (8 *Vict. c.* 20). *s.* 77 —*Canal Company—Power to purchase Mines.*] The original special Act of a canal company empowered them to construct certain works, and provided that nothing in the Act contained should be construed to give the company the mines under any land purchased by them under the provisions of that Act, unless the same should be expressly purchased and paid for by the company under a special provision thereinafter contained, empowering the company to purchase the mines under their works, or within a certain distance from them, if the owner of the mines should give the company notice of his intention to work them, but with that exception all mines should be deemed to be excepted out of every purchase of land by the company. By a subsequent special Act the company were empowered to construct additional works, and to acquire additional lands for that purpose, and with this Act sect. 77 of the *Railways Clauses Consolidation Act*, 1845, was incorporated. The Act also provided that the works authorized by it should be considered as part of the undertaking of the company, and, subject to the provisions of the Act, should for all purposes be treated as if the same had been originally part thereof:—*Held*, that the company had power, by virtue of sect. 77 of the *Railways Clauses Consolidation Act*, 1845, to make an express purchase of the mines lying under part of their works which they had constructed under the powers of their second special Act. Birmingham Canal Company *v.* Cartwright - - 421

RECEIVER—Appeal by—Bankruptcy - 911
See Bankruptcy. 17.

—— Mortgage—Bankruptcy - - 691
See Bankruptcy. 13.

RECONVERSION—Real and personal estate 341
See Administration. 2.

REDUCTION INTO POSSESSION—Wife's *chose in action* - - - - 442
See Husband and Wife. 1.

REDUCTION OF CAPITAL - - - 701
See Company. 12.

REGISTER OF MORTGAGES—Inspection of, by shareholder - - - - 256
See Company. 8.

REGISTRATION — Association of more than twenty persons—Non-registration 170
See Illegality.

—— Mortgage to directors of company - 579
See Company. 3.

—— Shares - - - - - 900
See Company. 5.

—— Trade-mark - - - 250, 669
See Trade-mark. 1, 2.

RELIGION—Change of—Forfeiture clause 959
See Power.

RELIGIOUS EDUCATION - - - 508
See Infant. 1.

REMOTENESS—Covenant to give right of pre-emption - - - - 421
See Covenant. 2.

—— Power of appointment - - - 959
See Power.

—— Restraint on anticipation - - 645
See Settlement. 4.

—— Will—Class - - - - 555
See Will. 5.

RENT—Apportionment - - - 681
See Apportionment.

—— Proof in bankruptcy—Disclaimer of lease
See Bankruptcy. 5. [572

REPLY—Delivery of—Delay - - 759
See Practice. 7.

REPRESENTATION — Appointment of personal representative by Court - - 419
See Practice. 14.

—— Debtor's estate - - - - 911
See Bankruptcy. 17.

REPUTED OWNERSHIP—Winding-up of company - - - - - 755
See Company. 13.

RESIDUE—Particular or general - - 949
See Charity.

RESOLUTION—For winding up - - 701
See Company. 12.

RESTRAINT ON ANTICIPATION - - 645
See Settlement. 4.

RESTRICTIVE COVENANT - - - 866
See Covenant. 3.

RETAINER OF SOLICITOR - - 244
See Solicitor. 3.

REVERSIONARY INTEREST—Mortgage 227
See Mortgage. 2.

REVIVOR - - - - - 436
See Practice. 1.

RIGHT OF WAY - - - 327, 968
See Way. 1, 2.

ROLLING STOCK —Hire of—Railway company —Ultrà vires act - - - 449
See Railway. 2.

RULES OF SUPREME COURT, 1875, Order XI., rr. 1, 1a - - - - 601
See Practice. 26.

—— —— r. 11 - - - - 213
See Partition. 2.

—— Order XVI., rr. 13, 14 - - 121, 436
See Practice. 1, 18.

RULES OF SUPREME COURT, 1875—*continued.*
—— Order XVI., r. 17 - - 392, 394, n.
See PRACTICE. 21, 22.
—— Order XVII., r. 2 - - - 905
See PRACTICE. 23.
—— Order XXII., r. 1 - - - 759
See PRACTICE. 7.
—— Order XXIV., r. 1 - - - 759
See PRACTICE. 7.
—— Order XXIX., r. 12 - - - 759
See PRACTICE. 7.
—— Order XXXI., r. 10 - - - 439
See PRACTICE. 20.
—— —— r. 11 - - - - 323
See PRACTICE. 25.
—— —— rr. 14, 15 - - - - 256
See COMPANY. 8.
—— Order XXXVI., rr. 3, 26 - 240, 656
See PRACTICE. 29, 30.
—— —— rr. 4, 4a - - - - 759
See PRACTICE. 7.
—— —— r. 6 - - - - 918
See PRACTICE. 31.
—— Order XLV., rr. 2, 3, 6 - - - 942
See PRACTICE. 11.
—— Order LVII., r. 6 - - - 905
See PRACTICE. 23.
—— Order LVIII., rr. 2, 5, 16, 17 - - 576
See PRACTICE. 6.
—— —— r. 6 - - - - 873
See PRACTICE. 4.
—— —— r. 8 - - - - 539
See PRACTICE. 3.
—— (Additional) Order VI., r. 18 - - 1
See PRACTICE. 27.

SALE—Partition action - - 78, 213, 652
See PARTITION. 1, 2, 3.

SALE OF GOODS—*Stoppage in Transitu—End of Transitus—Alteration of Relation between Carrier and Consignee—Constructive Delivery—Delivery of Part of Cargo—Lien of Ship's Master for unpaid Freight—Common Partner in Firms of Vendor and Purchaser.*] A cargo of 114 tons of miscellaneous iron castings was consigned from *Scotland* to *London* on board a ship chartered by the vendor, the bill of lading being made out in favour of the purchaser or his assigns, he or they paying freight. After thirty tons of the cargo had been delivered to the purchaser the vendor gave notice to stop the unloading of the ship. At this time only part of the freight had been paid to the master of the ship. Soon afterwards the purchaser filed a liquidation petition, and a receiver was appointed. The balance of the freight was paid by the receiver, and the remainder of the iron was placed *in medio*:—*Held*, that, inasmuch as it could not be supposed that the master intended to abandon his lien for the unpaid freight, the delivery of the thirty tons did not operate as a constructive delivery of the whole cargo, and that, consequently, the *transitus* was not at an end as to the remainder of the cargo, and the vendor's notice to stop *in transitu* was given in time.—In the absence of evidence to the contrary, it must, as a general rule, be assumed that the delivery of part of a

SALE OF GOODS—*continued.*
cargo is intended only to operate as a delivery of that part.—But, if the cargo consisted of the different parts of one entire machine,—*Semble*, that the delivery of an essential part of the machine would operate as a delivery of the whole.—*Slubey* v. *Heyward* (2 H. Bl. 504), *Hammond* v. *Anderson* (1 B. & P. (N.R.) 69), and *Jones* v. *Jones* (8 M. & W. 431) distinguished.—When goods are placed in the possession of a carrier to be carried for the vendor and to be delivered to the purchaser, the transit is not at an end so long as the carrier holds the goods as carrier, nor until by agreement between him and the purchaser he holds them, not as carrier, but as the purchaser's agent. The purchaser was also a partner in the vendor's firm:—*Held*, that this did not affect the right of the vendor to stop *in transitu*. *Ex parte* COOPER. *In re* MCLAREN - - - - C. A. 68

2. —— *Stoppage in Transitu—End of Transit—Delivery to Purchaser—Contract to deliver Goods free on board Ship to be named by Purchaser—Non-communication of ultimate Destination to Vendor.*] Delivery of goods by the vendor to a carrier, even though the carrier be nominated and hired by the purchaser, is only constructive, not actual delivery to the purchaser, inasmuch as the contract with a carrier to carry goods does not make the carrier the agent or servant of the person with whom he contracts.—Till the goods are in the actual possession of the purchaser the transit is not at an end, and it makes no difference that their ultimate destination has not been communicated by the purchaser to the vendor.—A contract was entered into for the sale of some china clay to be delivered free on board at a specified port, and to be paid for by an acceptance of the purchaser. Afterwards the purchaser chartered a ship and gave notice to the vendors, who then delivered the clay on board the specified ship at the port agreed upon. The destination of the clay had not been communicated to the vendors. Before the ship left the harbour the vendors heard of the insolvency of the purchaser, and gave notice to the master of the ship to stop the clay *in transitu*. No bill of lading had been signed, nor had the purchaser given any acceptance for the price of the clay:—*Held*, by the Chief Judge, that so soon as the clay was delivered on board the ship the transit was at an end, and the vendors had no right afterwards to stop the clay *in transitu*:—*Held*, by the Court of Appeal, that, the clay being in the possession of the master of the ship only as carrier, the transit was not at an end, and the notice to stop was given in time. *Ex parte* ROSEVEAR CHINA CLAY COMPANY. *In re* COCK [C. A. 560

SCANDAL—Striking out of affidavit - 1
See PRACTICE. 27.

SCHEME OF ARRANGEMENT—Company 605, [676
See COMPANY. 11, 15.

SCOTCH ASSETS - - - - 522
See ADMINISTRATION. 3.

SECURED CREDITOR—Bankruptcy 62, 220, 691
See BANKRUPTCY. 12, 13, 14.

—— Winding-up - - - - 160
See COMPANY. 14.

SECURITY—Right of surety - - 88
See Principal and Surety.

SEPARATE ESTATE—Charge of debt - 687
See Husband and Wife. 3.

—— Restraint on anticipation - - 645
See Settlement. 4.

SEQUESTRATION—Benefice - - 731
See Bankruptcy. 15.

SERVICE—Garnishee order - - 942
See Practice. 11.

—— Order under Infants' Custody Act—Untrue copy - - - - - 168
See Practice. 8.

—— Out of jurisdiction - - - 601
See Practice. 26.

SETTLEMENT—*Child—Dying without having been Married.*] By a marriage settlement the trust funds were, in the event of the husband surviving, to go as if the wife had died without having been married. She died, leaving her husband and one child surviving:—*Held*, that the trust funds went to the child. *In re* Ball's Trust - - - - - - 270

2. —— *Covenant to settle Wife's Property — Appointment to Wife — Instrument creating Power—Period of Vesting—Acquisition of Interest by Appointee.*] Under a marriage settlement real estate stood limited to *H.*, the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; and in default of appointment, to the use of the children of the marriage equally as tenants in common in fee.—There was issue of the marriage two children only, a son and a daughter. The daughter married, and by her marriage settlement she and her intended husband covenanted with the trustees for the conveyance and settlement of all property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests.—The daughter survived her husband, and thereupon *H.* by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son and daughter equally in fee, the daughter thus taking the same share as she would have taken in default of appointment:—*Held*, that inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement.—*In re Frowd's Settlement* (10 L. T. (N.S.) 367; 4 N. R. 54), *In re Vizard's Trusts* (Law Rep. 1 Ch. 588), and *De Serre* v. *Clarke* (Law Rep. 18 Eq. 587), discussed. Sweetapple *v.* Horlock - - - 745

3. —— *Real Estate—Legal Jointure—Money liable to be invested in Land—Reconversion — Equity of Jointress.*] Where money was liable to be invested in land to be settled to uses in strict settlement, and all the uses were exhausted except a legal jointure:—*Held*, that the jointress had an equity to compel the investment of the money in land, and that, consequently, the same must be treated as real estate as between the real and personal representatives of the person who, subject to

SETTLEMENT—*continued.*

the jointure, was entitled thereto.—*Semble*, it would be otherwise as to portioners. Walrond *v.* Rosslyn. Walrond *v.* Fulford - 640

4. —— *Restraint on Alienation beyond Legal Limits—Remoteness—Rule against Perpetuities.*] Bequest of a fund in trust for *A.* for life, and after her death in trust for her children living at her death, and the issue then living of any child then dead, in equal shares, the issue to take their parent's share; any legatees, being females, to take for their sole and separate use without power of anticipation. *A.* survived the testator and died leaving two married daughters who were born in the testator's lifetime;—*Held*, reluctantly following previous decisions, that the restraint on anticipation was void as infringing the rule against perpetuities, and that the daughters were accordingly entitled to have the fund paid to them in moieties, on their separate receipts, discharged from such restraint.—*Quære*, whether, inasmuch as the object of restraining a married woman from anticipation is to give her the beneficial enjoyment of her property, such a restraint ought not to be an exception to the general rule against perpetuities.—The doctrine of restraint on alienation considered. *In re* Ridley. Buckton *v.* Hay 645

—— Equity to - - - - 779
See Husband and Wife. 2.

SEWER—Construction of - - - 838
See Public Health Act.

SHARES—Transfer of - - - 900
See Company. 5.

SHAREHOLDER—Action by, on behalf of others
See Company. 4. [97

—— Fully paid-up—Winding-up petition - 36
See Company. 10.

—— Meeting of shareholders—Voting - 109
See Company. 7.

—— Right to inspect books of company - 256
See Company. 8.

SHOW OF HANDS—Meeting of shareholders 109
See Company. 7.

SOLICITOR—*Authority to receive Money for Client —Possession of Mortgage Deed executed by Client —Money due from Client to Solicitor and from Solicitor to Mortgagee—Solicitor's Duty as to keeping Diary—Court of Bankruptcy—Jurisdiction—Time for taking Objection—Bankruptcy Act*, 1869, *s.* 72.] The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorize him to receive the mortgage money for the client.—If the client has not received the money the mortgagee cannot maintain the validity of the mortgage deed by shewing that he paid the money to the solicitor, unless he can shew that the solicitor was expressly authorized by the client to receive it.—*Viney* v. *Chaplin* (2 De G. & J. 468) followed.—*Barker* v. *Greenwood* (2 Y. & C. Ex. 414) distinguished.—A solicitor, having been instructed by a client to raise £400 for him by a mortgage of some houses belonging to him, prepared a mortgage of the property to another client, the deed containing a recital that the mortgagor had applied to the mortgagee for a loan of £400, which the mortgagee

SOLICITOR—*continued.*

had agreed to lend on the security of a mortgage of the property. The solicitor induced the mortgagor to execute the deed, without receiving the money, and afterwards handed it over to the mortgagee as security for a debt of £300, which he (the solicitor) already owed to the mortgagee, telling him that he had himself made advances to the mortgagor. He had in fact advanced the mortgagor £200. The solicitor soon after absconded. It was not shewn that the mortgagor had expressly authorized him to receive the mortgage money:—*Held*, by the Court of Appeal, that, even if it was the intention of the mortgagor that the solicitor should be paid the £200 out of the £400 when paid by the mortgagee, the mortgagee was not entitled to hold the mortgage deed as security to the extent of the £200 due from the mortgagor to the solicitor.—The deed was accordingly declared void as against the trustee in bankruptcy of the mortgagor.—Observations as to duty of a solicitor to keep a diary of his transactions with his clients. *Ex parte* Swinbanks. *In re* Shanks - - - - - C. A. 525

2. —— *Bill of Costs—Settled Account—Taxation after Payment—Special Circumstances—Undue Influence—Unnecessary Business—Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 41—*Practice—Evidence.*] An account which had been settled between a client, who was an old lady, and her solicitor, including arranged bills of costs, was ordered to be opened and the bills of costs taxed, after the lapse of nearly two years, without actual proof of error or overcharge, on the ground that the client had acted under undue influence and without sufficient information, and that much of the business charged for was unnecessary and improper.—The judgment of *Malins*, V.C., affirmed.—All documents intended to be used in evidence in an action ought to be formally put in at the trial and marked by the Registrar. Watson *v.* Rodwell [C. A. 150

3. —— *Retainer—Joint or Separate.*] In a suit by a shareholder against the seven directors, the secretary and the company, to restrain an action for calls, to be relieved of his shares on the ground of misrepresentation in the prospectus, and to be indemnified by the directors, the Defendants, having all appeared by *A.*, the same solicitor, put in a joint and several answer, signed by one counsel, and joined in their defence, signed three separate retainers to *A.*, all in the following terms:—"You having up to the present time conducted the defence of this suit on behalf of all the Defendants, and, in pursuance of their instructions in that behalf, we the undersigned do hereby confirm such instructions, and request you to continue such defence, and to take such steps as you may consider necessary in the matter":—*Held* (affirming the Taxing Master's decision), that the retainers were separate and not joint, and that the assets of the company (in liquidation) were liable for one-ninth only of the costs. *In re* Allen. Davies *v.* Chatwood - - - - 244

—— Charging order - - - - 942
See Practice. 11.

—— Fraudulent dealing with mortgage deed 398
See Mortgage. 1.

SPECIFIC PERFORMANCE—Agreement for lease
See Landlord and Tenant. [129

—— Covenant to give pre-emption - - 421
See Covenant. 2.

STATUTES:

20 Hen. 3, c. 4—*Statute of Merton* - 798
See Common.

13 Ed. 1, c. 46—*Statute of Westminster* - 798
See Common.

27 Eliz. c. 4—*Fraudulent Conveyance* - 1
See Fraudulent Conveyance.

43 Geo. 3, c. 108—*Mortmain* - - 949
See Charity.

2 & 3 Will. 4, c. 71—*Prescription* - 852
See Noise.

3 & 4 Will. 4, c. 42—*Amendment of Law* 227
See Mortgage. 2.

5 & 6 Will. 4, c. 50—*Highway Act* - 327
See Way. 1.

—— —— s. 65 - - - - 214
See Highway.

1 Vict. c. 26, s. 24—*Wills* - - - 681
See Apportionment.

5 & 6 Vict. c. 116, ss. 7, 9, 12—*Insolvency* 48
See Insolvency.

6 & 7 Vict. c. 73, s. 41—*Solicitors* - 150
See Solicitor. 2.

7 & 8 Vict. c. 96, ss. 4, 8, 10, 73—*Insolvency*
See Insolvency. [48

8 & 9 Vict. c. 18, s. 127—*Lands Clauses* 611
See Railway. 1.

8 & 9 Vict. c. 20, s. 45—*Railways Clauses* 611
See Railway. 1.

—— —— s. 77 - - - - 421
See Railways Clauses Act.

—— —— s. 87 - - - - 449
See Railway. 2.

11 & 12 Vict. c. 63, ss. 45, 46—*Public Health*
See Public Health Act. [838

15 & 16 Vict. c. 86, s. 44—*Chancery Improvement* - - - - - 419
See Practice. 14.

—— —— s. 48 - - - 204, 205
See Practice. 16, 17.

17 & 18 Vict. c. 36, s. 1—*Bills of Sale* - 539
See Bills of Sale Act.

18 & 19 Vict. c. 122, ss. 3, 88—*Metropolitan Building Act* - - - 412
See Metropolitan Building Act.

21 & 22 Vict. c. 27, s. 2—*Lord Cairns' Act* 146
See Practice. 13.

23 & 24 Vict. c. 127, s. 28—*Solicitors* - 942
See Practice. 11.

25 & 26 Vict. c. 89, s. 4—*Companies* - 170
See Illegality.

—— —— s. 38 - - - - 386
See Company. 9.

—— —— s. 43 - - - - 256
See Company. 8.

—— —— ss. 87, 163 - - - 676
See Company. 11.

—— —— s. 91 - - - - 372
See Company. 2.

STATUTES—*continued.*
25 & 26 Vict. c. 89, ss. 136, 159, 160 - 605
See COMPANY. 15.
—— —— ss. 142, 143 - - - 140
See COMPANY. 6.
—— —— s. 145 - - - - 701
See COMPANY. 12.
—— —— Table A - - - 900
See COMPANY. 5.
27 & 28 Vict. c. 112, s. 1—*Judgments* - 691
See BANKRUPTCY. 13.
30 & 31 Vict. c. 131, ss. 9, 25—*Companies* 701
See COMPANY. 12.
31 & 32 Vict. c. 40, ss. 3, 4, 5—*Partition* 78
See PARTITION. 1.
32 & 33 Vict. c. 71, ss. 6, 7, 8, 9—*Bankruptcy*
See BANKRUPTCY. 3. [303
—— —— s. 12 - - - - 220
See BANKRUPTCY. 12.
—— —— —— - - - - 160
See COMPANY. 14.
—— —— s. 16 - - - - 691
See BANKRUPTCY. 13.
—— —— s. 23 - - - 572, 908
See BANKRUPTCY. 4, 5.
—— —— s. 31 - - - - 914
See BANKRUPTCY. 10.
—— —— s. 37 - - - - 317
See BANKRUPTCY. 11.
—— —— s. 71 - - - - 56
See BANKRUPTCY. 16.
—— —— s. 72 - - - 148, 525
See BANKRUPTCY. 7, 9.
—— —— s. 82 - - - - 724
See BANKRUPTCY. 18.
—— —— s. 87 - - - - 676
See COMPANY. 11.
—— —— s. 88 - - - - 731
See BANKRUPTCY. 15.
—— —— s. 92 - - - - 306
See BANKRUPTCY. 6.
—— —— ss. 94, 95 - - - 539
See BILLS OF SALE ACT.
32 & 33 Vict. c. 83, s. 15—*Bankruptcy Repeal*
See INSOLVENCY. [48
33 & 34 Vict. c. 35, s. 2—*Apportionment* 681
See APPORTIONMENT.
33 & 34 Vict. c. 76, s. 1—*Absconding Debtors*
See BANKRUPTCY. 2. [298
33 & 34 Vict. c. 104, s. 2—*Companies Arrangement Act* - - - 605, 676
See COMPANY. 11, 15.
36 & 37 Vict. c. 12, s. 2—*Infants* - - 508
See INFANT. 1.
—— —— - - - - - 168
See PRACTICE. 8.
36 & 37 Vict. c. 66, s. 24, sub-s. 3—*Judicature Act* - - - - 392, 394, n.
See PRACTICE. 21, 22.
—— —— —— sub-s. 5 - - - 24
See PRACTICE. 19.
38 & 39 Vict. c. 55—*Public Health* - 838
See PUBLIC HEALTH ACT.

STATUTES—*continued.*
38 & 39 Vict. c. 60, s. 15—*Friendly Societies*
See FRIENDLY SOCIETY. [768
38 & 39 Vict. c. 77, s. 10—*Judicature Act* 160,
See COMPANY. 11, 13, 14. [676, 755
38 & 39 Vict. c. 91—*Trade-mark* 250, 669
See TRADE-MARK. 1, 2.
STAYING PROCEEDINGS—Pending appeal
See PRACTICE. 6, 28. [136, 576
STOPPAGE IN TRANSITU - - 68, 560
See SALE OF GOODS. 1, 2.
STRIKING OUT PLEADINGS - - 1
See PRACTICE. 27.
SUBSTITUTIONAL GIFT - - 663, 873
See WILL. 3, 4.
SUPERFLUOUS LAND—Railway company 611
See RAILWAY. 1.

TAXATION OF COSTS - - - 206
See PRACTICE. 12.
—— Bill of costs after payment - - 150
See SOLICITOR. 2.
TENDER—Part of debt—Refusal to accept 303
See BANKRUPTCY. 3.
TESTAMENTARY EXPENSES—Costs of action
See ADMINISTRATION. 1. [440
TIME—Enlargement of—Practice - 759, 905
See PRACTICE. 7, 23.

TRADE-MARK — *Registration — Regulations of Commissioners of Patents — Words in Foreign Characters—Trade Marks Registration Act.* 1875 (38 & 39 *Vict. c.* 91), *ss.* 1, 5, *par.* 3—*Trades Marks Rules*, 1876, *r.* 68.] A regulation having been issued by the Commissioners of Patents forbidding the registration as a trade-mark of any word in foreign characters:—*Held*, that such regulation was *ultrà vires* and void.—A firm of watchmakers, who for many years had been in the habit of using the word "*Tod*" painted or engraved in Arabic characters on the dials of watches, as a trade-mark for a particular class of watches, consigned by the makers to a firm of *Tod, Müller, & Co.*, for sale in the East—where the mark was well known—applied to have this trade-mark registered. The Registrar, in obedience to the above-mentioned regulation of the Commissioners of Patents, refused.—The Court ordered the trade-marks register to be rectified by inserting therein the name of the firm as proprietors of the firm as proprietors of the trade-mark. *In re* ROTHERHAM'S TRADE-MARK - - - - 250

2. —— *Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91)—*Class* 42 *of* 1*st Schedule to the Rules—Bacon and Hams—"Anchor Brand"—Old and New Trade-Marks, Registration of—"Leave of the Court."*] There being under the *Trade Marks Registration Act*, 1875, four trade-marks including an anchor registered in respect of goods in Class 42 of the 1st schedule to the Rules made under the Act, the Court refused to give leave to the Registrar to register a new trade-mark including an anchor in respect of goods in the same class, but different in character from those goods for which the four trade-marks had been registered. *In re* HARGREAVES' TRADE-MARK [669

TRADE-MARKS REGISTRATION RULES, 1876
See Trade-mark. 1, 2. [250, 669
TRADE-NAME—Action to restrain use—Trial by jury - - - - - 656
See Practice. 29.
TRANSFER INTO COURT—Irish railway stock
See Trustee Acts. [888
TRANSFER OF SHARES - - - 900
See Company. 5.
TRANSIT—End of—Stoppage *in transitu* - 560
See Sale of Goods. 2.
TREASURER—Friendly society—Corporation
See Friendly Society. [768
TREE—Overhanging highway—Order to remove
See Highway. [214
TRIAL BY JURY - - - 240, 656
See Practice, 29, 30.
TRIAL OF ISSUES - - - - 918
See Practice. 31.
TRUST—Illegal company - - - 170
See Illegality.
TRUSTEE—Lunatic—Trustee Acts - 888
See Trustee Acts.
—— Notice to—Assignment of debt - 198
See Assignment of Debt.
TRUSTEE IN BANKRUPTCY—Disclaimer
See Bankruptcy. 4, 5. [572, 908
—— Vacating appointment of - - 869
See Bankruptcy. 19.

TRUSTEE ACTS—*One of several Trustees of Unsound Mind—Irish Railway Stock—Transfer into Court.*] One of the trustees of an estate which was being administered by the Court having become of unsound mind, an order was made under the *Trustee Act*, 1850, s. 5, appointing a person to concur with the other trustee in transferring into Court certain Irish railway stock standing in the names of the trustees. It being discovered before the order was drawn up that owing to sect. 56 of the Act such an order could not be made as to Irish stock, an order was made appointing a person new trustee of the Irish stock in the place of the person of unsound mind, and directing him to concur with the other trustee in transferring the stock into Court. *In re* Hodgson. Lord Kenlis *v.* Hodgson - - C. A. 888

ULTRÀ VIRES ACT—Railway company—Hire of rolling stock - - - 449
See Railway. 2.
—— Railway company—Sale of land under railway arch - - - - 611
See Railway. 1.
UNDERLEASE—Agreement for - - 129
See Landlord and Tenant.
UNDUE INFLUENCE—Solicitor and client 150
See Solicitor. 2.
UNSOUND MIND—Person of—Trustee - 888
See Trustee Acts.
USER—Easement—Prescription - - 852
See Noise.

VALUATION OF SECURITY—Proof in bankruptcy
See Bankruptcy. 1, 4. [62
VERDICT—Estoppel—Pleading—Issue in suit
See Estoppel. [798
VESTING—Period of - - - 745
See Settlement. 2.
—— Period of - - - - - 406
See Will. 6.
VESTRY—Contract for use of way by public 327
See Way. 1.
VOLUNTARY WINDING-UP - 109, 140, 701
See Company. 6, 7, 12.
VOTING—General meeting of shareholders 109
See Company. 7.

WARREN OF CONIES - - - 798
See Common.
WATER—Injury from—Neighbouring mine 782
See Mine.

WAY—*Contract to dedicate to Public—Vestry—Purchaser for Value without Notice—5 & 6 Will. 4, c. 50.*] In December, 1864, *B.*, who was in possession of land adjoining the River *Thames*, under an agreement for a lease for eighty years, gave notice to the Board of Works for the district that he desired to divert a public footway which crossed the land, and that he proposed to substitute a better footway, and also to make a new roadway to the water-side between two points specified, and throw the same open to the public. The vestry agreed to the application, subject to the proposed new roadway being made and thrown open to the use of the public, and the new footway being properly made. In April, 1865, the Justices made an order for the stopping up and diversion of the old footway. This was done by *B.*, and he also constructed the new road. The owners of the fee, however, did not give their assent, and there was, in the opinion of the Court, no sufficient evidence of any actual dedication of the way to the public. In May, 1866, a lease of the land to *B.* was executed, in which it was described as "All that piece of land, &c., as the same are more particularly delineated and described on the plan drawn in the margin hereof," and the habendum was made "subject to the existing rights of way over the said land." In the plan the new road was shewn, but was marked "Private road." There were other rights of way over the land. In June, 1866, *B.* assigned the lease for value to the *B. Company*, and there was nothing to shew that they had any notice of *B.'s* agreement, or of the existence of a right of way over the road, other than such notice as was given by the lease itself, there being, in the opinion of the Court on the evidence, nothing, in the appearance of the road or in the extent of its user by the public, to convey to a person inspecting the property any notice that there was a public right of way. After other assignments the lease became vested in *W.*, to whom the Defendants were tenants. In the sale plan, by reference to which *W.* purchased, the road was marked "private road," but appeared to terminate at the *Thames* at a point marked "Ferry from *Blackwall Stairs*." The Defendants stopped up the road. An information was filed by the Attorney-General, at the relation of the vestry of the parish, to restrain the Defendants during the remainder of their term from obstructing the road. The Defendants, by

WAY—*continued.*

their answer, alleged that *W.* was a purchaser for value without notice of the agreement between *B.* and the vestry:—*Held*, by *Fry*, J., that there was a valid contract between *B.* and the vestry for a license to the public to use the new road during his term, which the vestry could have enforced against *B.*, and that probably *W.* ought to be held to have purchased with notice of it; but that, looking at the lease and the plan together, no notice of the existence of a right of way over the new road was given to the *B. Company*, and that, as they had no other notice of its existence, they were purchasers of the lease for value without notice of the right of way, and therefore entitled to hold the property free from it, and that the Defendants, as claiming through them, stood in the same position, even if any of the intervening assignees had acquired the lease with notice of the right of way; and that the information must therefore be dismissed.—*Held*, on appeal, that, as the Defendants had not by their answer alleged that the *B. Company* had no notice of the right of way, they could not avail themselves of the defence that the *B. Company* were purchasers for value without notice; but the defence that *W.* was a purchaser without notice was sustained, there not being enough on the sale plans to affect him with notice that there was a public right of way; and that, therefore, assuming the existence of an agreement which could have been enforced against *B.*, it could not be enforced against the Defendants. Attorney-General *v.* Biphosphated Guano Company - - C. A. 327

2. —— *Way of Necessity—Election—Appurtenances—Exception in Conveyance.*] A contract to sell land with the appurtenances does not pass a right to a way to the land sold which the vendor has used over adjoining land of his own.—Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there are to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select. Bolton *v.* Bolton [968

—— Damages under Lord Cairns' Act - 146
See Practice. 13.

—— Under railway arch—Superfluous land 611
See Railway. 1.

WILL — *Construction — Absolute Gift — Specific Chattels — Power to appropriate such Parts as Legatee should desire.*] Gift by a testator of his plate to trustees upon trust to permit his widow "to have and appropriate absolutely to herself such parts thereof as she should signify in writing her desire to possess":—*Held*, that the widow was entitled to the whole of the plate. Arthur *v.* Mackinnon - - - - 385

2. —— *Construction — Annuity — Corpus or Income—Bequest of Residue—Direction to set apart Investments.*] A testator empowered his trustees to make demises of his estate for building purposes, and also at their discretion to sell his real and personal estate, and directed them to invest the proceeds, and the rents, issues, and profits of his estate, and to set apart a sufficient part of such investments to produce an annuity of £1200, which he bequeathed to his wife for her

WILL—*continued.*

life, payable on the usual quarter days; and he gave the entire residue of his said trust estate, and also that part thereof set apart for his wife after her death, upon certain trusts for the benefit of his children. The income of the estate was not sufficient to provide for the widow's annuity of £1200:—*Held* (reversing the decision of *Hall*, V.C.), that the widow was entitled to have the deficiency raised out of the corpus of the trust estate.—*Baker* v. *Baker* (6 H. L. C. 616) distinguished. Gee *v.* Mahood - - C. A. 891

3. —— *Construction — Implication — Bequest after Death of Wife—Life Estate by Implication—Descendants taking Parent's Share.*] A testator, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay his testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of all his remaining property should be divided into twelve portions, three of which should be given "to the children" of his late aunt, Mrs. *W.*, "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive," with similar gifts to the "children and descendants" of his other aunts; "and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease, nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of an annuity of £700 to which his wife was entitled under her marriage settlement. The wife died in 1876. The testator's co-heirs were certain of the children of the aunts, and his next of kin were certain children of the aunts. The children of the aunts were all dead, but many of them had left children and grandchildren:—*Held* (affirming the decision of *Hall*, V.C.), that the widow did not take a life estate by implication.—A life estate in *A. B.* will not be implied from a gift on the death of *A. B.* to the testator's heir-at-law or next of kin along with other persons.—*Held* (reversing the decision of *Hall*, V.C.), that the substitutionary gift to "descendants" of children of an aunt was not confined to children of those children.—The word "descendants" is less flexible than "issue," and requires a stronger context to confine it to children.—*Held*, that if the word used in the present case had been "issue" instead of "descendants," the gift over would have prevented the Court from confining the word to children.—*Ross* v. *Ross* (20 Beav. 645) approved. Ralph *v.* Carrick [C. A. 873

4. —— *Construction—Original Gift—Substitutional Gift—Gift to Issue of Deceased Children.*] A testatrix, by her will, in exercise of a general power, appointed real and personal estate to trus-

WILL—*continued.*

tees in trust for her sister *H.* for life, and after her death for all and every her children and child who should be living at her death, if more than one as tenants in common; and provided "that if any child of *H.* should die in the lifetime of *H.*, leaving issue who should be living at the death of *H.*, such issue should take the share which his, her, or their parent would have taken if living at the death of *H.*; and if there should be no child or children, or issue of a child or children of *H.* so living at her death," then the testatrix gave over the fund to other persons. *H.* had one child who was dead at the date of the will leaving issue who were living at her death, and other children who survived her:—*Held*, that the gift to issue was original and not substitutional, and that the issue of the child who was dead at the date of the will were entitled to take under it. *In re* Woolrich, Deceased. Harris *v.* Harris - 663

5. —— *Construction—Perpetuity—Remoteness—Gift to a Class consisting of Children and remoter Issue—Gift whether partially or wholly void.*] A testator gave a fund in trust for *A.* for life, and after his death for all his children who should attain twenty-one, and the issue of such of them as should die under that age leaving issue, "which issue should afterwards attain the age of twenty-one, or die under that age leaving issue at his, her, or their decease or respective deceases, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living":—*Held* (affirming the decision of *Jessel*, M.R.), that the gift to the children could not be severed from the gift to the remoter issue, but the whole gift was void as infringing the rule against perpetuities.—*Smith* v. *Smith* (Law Rep. 5 Ch. 342) followed. *In re* Moseley's Trusts - - - - C. A. 555

6. —— *Construction—Vesting—Gift of Income for Maintenance—Gift to Children at Twenty-one—Discretionary Power in Trustees.*] Testator gave to trustees a sum of money upon trust to pay the income unto *A. B.* and his wife during their joint lives, and to the survivor for life, and after the decease of the survivor to apply the income thereof, or of so much thereof as they should think proper, in the maintenance, education, and bringing up of their child or children during their minorities, and upon their attainment to the age of twenty-one years to pay and divide the principal sum, with the accumulations thereof, unto and equally amongst such child or children, and in case there should be no child, unto *A. B.*, his executors, &c.—Two out of four children, the issue of the marriage, died infants without having been married, and one child attained the age of twenty-one years, and died intestate without having been married:—*Held*, that the shares of the children did not vest till they attained the age of twenty-one years, and that the surviving child, who attained the age of twenty-one years and married, was entitled to the deceased children's shares.—*Watson* v. *Hayes* (5 My. & Cr. 125) followed, and *Fox* v. *Fox* (Law Rep. 19 Eq. 286) distinguished. *In re* Grimshaw's Trusts - - - 406

—— Agreement to sever joint tenancy by will 267
See Joint Tenant.

—— Apportionment of rent - - - 681
See Apportionment.

—— Charitable legacy - - - 949
See Charity.

—— Perpetuity—Restraint or alienation - 645
See Settlement. 2.

—— Power of appointment - - - 959
See Power.

WINDING-UP.
See Cases under Company.

WORDS—"Appurtenances" - - 968
See Way. 2.

—— "Descendants" - - - - 873
See Will. 3.

—— "Maintain and work" - - - 625
See Railway. 3.

—— "Person aggrieved" - - - 56
See Bankruptcy. 16.

—— "Testamentary expenses" - - 440
See Administration. 1.

—— "Without having been married" - 270
See Settlement. 1.

WORKING AGREEMENT—Railway company
See Railway. 1, 2, 3. [449, 611, 625

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